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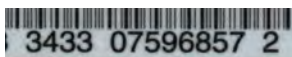
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THE
LAW

OF

7761 ~~of the Middle Temple~~
INFANCY

AND

COVERTURE.

—
BY PEREGRINE BINGHAM, A. B.
OF THE MIDDLE TEMPLE.
—

FIRST AMERICAN FROM THE LAST LONDON EDITION
improved by notes and references to
AMERICAN DECISIONS.

—
BY A MEMBER OF THE NEW-HAMPSHIRE BAR.
—

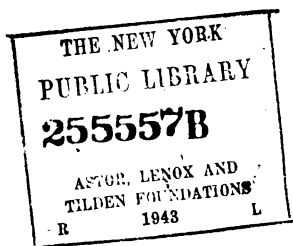
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EXETER:

PUBLISHED BY GEORGE LAMSON,

1824.
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1. ~~Woman, Married - legal status.~~
2. Woman, Married - legal status.
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ADVERTISEMENT.

ALL mention of the effect of *an infant's assurance by lease and release* having been omitted in the present Work, the Author feels it incumbent on him to state his reasons for this omission.

The case of *Zouch v. Parsons* (3 Burr. 1794.) has expressly decided that an *infant's conveyance by lease and release is voidable only*, and not void.

This decision, it appears, has been considered by some branches of the profession, as unsound. In Mr. Preston's late Treatise on Conveyancing, (Vol. 2. page 248.) we meet with the following passage :

"No lawyer of eminence has thought it safe to follow that decision in practice ; and that excellent property lawyer, the present Chancellor, has repeatedly approved the observations of counsel, when questioning the authority of this case.

"To admit, indeed that such a decision is law, is to confound all distinctions, and to oppose all authority on this head."——"Though the case of *Zouch and Parsons* has not been expressly overruled, the probability is, that whenever the point shall require an express and explicit decision, it will be determined that a conveyance by lease and release, made by an infant, cannot, under any circumstances of interest or no interest in the infant, or benefit or no benefit to him, be supported."

And in page 375,

“ It would be well for every lawyer that such a decision had never existed to be remembered.”

In deference to such authority, the Author has forborne to adduce the case of Zouch and Parsons in support of the position, that an infant's conveyance by lease and release, is *not absolutely void, but only voidable* ; and as he was not aware of any other decision to this effect, he has for the present left the point untouched.

He humbly submits, however, that the great body of authorities advanced by him in Chapter II. of the present Work, and the reasoning he has founded on them, tend to prove satisfactorily, that the lease and release of an infant, as well as all other his acts, deeds, and contracts, (with the exceptions of an account stated, a warrant of attorney, a will of lands, a release as executor, and a conveyance to his guardian) are voidable only, and not void. If so, the case of Zouch and Parsons must still be considered as sound law. Littleton's 547th section, with Lord Coke's commentary on it, seems to go a long way in support of this position.

Notwithstanding what has been laid down by Lord Bacon, Mr. Preston seems also to doubt whether an infant can bargain and sell a use, though he admits that a lease for years *rendering rent*, granted by an infant, would be only voidable. But if benefit, or the semblance of benefit to the infant, (such as rendering him rent,) be any criterion whereby we can ascertain whether his instrument is void or voidable, the *valuable* consideration which is essential to bargain and sale, ought to avail as much in defence of that instrument, as rent reserved, in defence of a lease.

At all events, an objection on the score of uses, cannot apply to a conveyance by lease and release, where the lease for a year is a lease at common law, and the interest vested by entry.

Mr. P. further states, as a reason why an infant cannot covenant to stand seised, "that *he is incapable of making a deed.*" This also appears wholly incompatible with the authorities advanced in support of a contrary doctrine in Chapter II. of the present Work.

It is with much fear and reluctance that the Author has made the foregoing observations ; but the result of his minute and laborious researches on the subject, having convinced him that the deeds and contracts of an infant are, with the exceptions he has stated, voidable only, and not void, he would, by abstaining from these remarks, be guilty of a dishonesty highly unfavourable to that cause, which writers must all feel so anxious to promote—the cause of truth.



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APPENDIX.

In the following note, a comprehensive view is attempted to be given of the doctrine of lease and release, under a more systematic arrangement than the writer has been able to meet with.

The feudal policy required that the transfer of freehold property should be completed by public delivery of possession; and even, by enactments of later date, the notoriety of an enrollment was rendered necessary to the validity of a bargain and sale of freehold interests.

When, from the alterations in tenure, this notoriety and these ceremonies became comparatively of little importance, and increasing commerce required a rapid and secret transfer of property, means were speedily devised for attaining this object.

It was admitted by the common law, that a party actually in possession of property under a partial interest, as for life or years, might, without the necessity of further ceremony, have that interest enlarged to a fee, by a release from the party in reversion or remainder.

And by the statute of uses, persons having any use in lands are declared to be actually seised of the legal estate of the persons seised to their use.

The alienor, therefore, bargains and sells to the alienee a lease for a year in the premises intended to be disposed of. By virtue of this bargain and sale the alienor is seised to the use of the alienee for a year, and the alienee

becomes thereon under the enactment in the statute, legally invested with the property, without taking any further steps. This fictitious or statutory investiture of the alienee being considered, as to this end, equivalent to an actual possession at common law, it only remains for the alienor to enlarge the alienee's estate for a year, by releasing to him the fee.

By this contrivance, the trouble of taking actual possession, and notoriety of enrolment, are completely eluded. The bargain and sale, which is always a conveyance to uses, placing the alienee constructively in possession by virtue of the statute;—and the lease for a year not requiring enrolment, which is only necessary to a bargain and sale of freeholds.

Such is the origin and nature of the conveyance by lease and release; but, in order fully to comprehend the effect of this species of assurance, it will be necessary to consider its component parts more in detail. This will be done under five heads:

1. What estate a party must or may have to support a release.

2. The nature of the privity required between relessor and relesee.

3. What estate the releasor must have—which includes what may be conveyed by release.

4. Who may be relessor or relesee in respect of personal qualification.

5. The general effect and nature of this conveyance, with some cautions as to the structure of it.

1. First then, with respect to the estate on which a release *may* operate, it is only necessary that the relesee should, prior to the execution of the release, have acquired a *vested* estate, either in possession, remainder, or reversion, capable of enlargement. (a)

(a) Litt. s. 459. Co. Litt. 270.

It has already appeared, that under a bargain and sale for a year the interest is vested in the lessee by reason of his constructive possession under the *statute*. (I say constructive possession; for though it is such a vested interest in the particular estate, as has been deemed sufficient to support a release by way of enlargement, yet the lessee cannot, under this constructive possession, maintain an action of trespass before actual entry.)(b)

And it is always prudent to make a new lease for a year the foundation of a release, instead of relying on a release to the assignee of a mortgage term, or on some ancient estate; for in the latter cases, the release can operate only under the common law learning applicable to releases, instead of those simpler rules to which a lease and release, as parts of the same assurance, owe their origin. Besides, the lease for a year, as part of the same assurance with a release, enables the releesee to give, from his own title deeds, certain evidence that he had, at the date of the release, an estate capable of enlargement.

However, as this species of assurance may operate by way of enlargement of particular vested interests in general, it will be proper to specify what other estates besides a lease for a year bargained and sold, are capable of this enlargement.

A party already in possession under a common law lease for years,(c) either in his own right, or in autre droit as husband(d) or executor,(e) may have his estate enlarged by a release of the fee: but under such a lease he must be actually in possession, and not merely clothed with an *interesse termini*, or right of entry, which in so exile an estate as a term for years was considered at *common law*, is only an *executory* and not a *vested* interest.(f)

(b) *Barker v. Keat*, 2 Mod. 251.

(c) *Lit. sec.* 459. 465.

(d) *Co. Lit.* 273. b. 299. a.

(e) 2 *Preston on Conv.* 284.

(f) *Lit. a.* 459. *Co. Lit.* 48. b. 270. a.

It was once thought that a lease for a year of a *reversion*, was not a sufficient estate whereon to ground a release of the residue of the interest; and that therefore a reversion could not be conveyed by lease and release. This arose from an idea that *possession* must form the groundwork of a release; but we have seen that a *vested* interest is sufficient: besides, which, as much *possession* of a reversion, if such expression may be used, being obviously a species of possession different from that of land. It is now agreed, that a reversion may be conveyed by lease and release.(g)

The estate of tenant at will,(h) copyholder,(i) cestui que trust holding at the will of trustees,(k) or mortgagor holding at the will of mortgagee, is sufficient to support a release; but the parties must actually have entered, or they have not such a vested estate as a release can operate on. (Quære, Whether copyholder does not, by admittance, acquire such a vested estate, before entry.)

Littleton lays it down, that "where a man of his own head occupied lands or tenements at the will of him which hath the freehold," (which Coke expounds as a tenancy by sufferance) he cannot take by release, because there is no privity between him and the freeholder, by a lease made, nor by other manner. However, it seems that at the present day a release to such an occupier would be deemed evidence of an admission that he held at will:(l) and even a wrongdoer is capable of taking a release by way of extinguishment.

It seems now agreed, that the estates of tenant by elegit, statute merchant,&c., are capable of enlargement by release when completely executed.(m) However, as ten-

(g) Gilbert on Uses, 298. 2 Lord Raym. 798. Shortridge v. Lamplgh.

(h) Lit. s. 460.

(i) Watkin's Copy. 36. s.

(k) Lit. s. 462, 463.

(l) Rees v. Lloye, Wight. 123. Preston on Conv. 303.

(m) Co. Lit. 270. b. 273. b. Shep. Touch, §42.

ant by *elegit*, though he hath but a chattel, holds it *ut liberum tenementum*, it may be thought that his interest becomes sufficiently vested to admit of a release the moment the sheriff has clothed him with *legal* possession under the writ *liberate*, and before actual entry under an *ejectment* and “*habere facias possessionem*.” For,

A tenant for life (whose estate, whether in his own right or in *autre droit*, is likewise capable of enlargement by release,) may also take by release when he has only *seisin* in law, as where his estate for life is in remainder ⁽ⁿ⁾ on which remainder a release may be made, during the continuance of a prior particular estate, or after the determination thereof, and before entry.

The estate of tenant by curtesy and tenant in dower, form a good foundation for a release to operate on : but the estate of tenant in dower must be first perfected by execution or endowment ; for before that she has only a title and no estate.^(o)

It is also agreed, that a release to a tenant in tail may operate by way of accession of estate.^(p) And though the effect of a release is in most cases to occasion a merger of the particular estate to be enlarged, when the particular estate, and the estate granted by way of enlargement, are immediate to each other ; yet the grant to a tenant in tail of an immediate estate, will not operate to enlarge the estate tail against the issue.^(q)

The result of the forgoing is, that every particular vested estate is capable of enlargement by way of release ; but no contingent or executory interest.

2. But to qualify a tenant to receive a release, it is not sufficient merely that he should have the *possession*, or that he should have a *vested* estate ; there must be a connec-

(n) Co. Lit. 570. b.

(o) 2 Preston on Conv. 285.

(p) 6 Roll. Abr. 400. Shep. Touch. 323.

(q) Preston on Conv. 286.

tion in point of tenancy ; or, as the law terms it, a *privity* between the relessor and relessee.

There is an immediate privity between lessor and lessee, tenant at will for years or life, and the party who has the immediate reversion or remainder, in fee, for life, or in tail; between cestui que trust and his trustee, tenant by statute or elegit, and the party who has the reversion or estate of the debtor, between copyholder and lord, tenant in tail, and reversioner or remainderman in fee. And in all cases the assignees of the particular tenant, or of the reversioner or remainderman, may be considered as standing in the place of his assignor ; and is capable, the one of taking, the other of conveying, by release.(r)

But there is no privity between the reversioner or remainderman and the lessee of particular tenant : and reversioner or remainder man cease to stand in that relation, the moment either of them has assigned his interest.

Therefore if A. make a lease for life or years to B., and B. makes an underlease to C. ; and afterwards A. releases to C. and his heirs ; this release is void to enlarge the estate, because there is no privity between A. and C.(s) For the same reason, if tenant in tail make a lease for life, and the donor release to the lessee and his heirs, this release is void to enlarge the estate.(t) But tenant in tail may still himself take by release, where he has made a lease for his own life only.(u) And a change of circumstances by merger, surrender, or forfeiture, in that estate which was originally the particular estate, may, it is apprehended, place the underlessee in a situation to receive a release from the owner of the original reversion or remainder. As where A. is tenant for life, remainder to B. in fee, A. demises to C. for years, and then A. and B.

(r) Preston on Conv. 338.

(s) Co. Lit. 273. a.

(t) Ibid.

(u) 1 Saund. Rep. 250. Tooke v. Glascock, 2 Lord Raym. 778.

release to C. ; this shall be considered as a merger of C.'s estate by the accession of A.'s after which merger and a cession, there arises between C. and B. the privity requisite to support the release from B. (x)

It must be remembered, that where the particular tenant only *underlets* his estate, the privity between him and his remainderman, or reversioner, still subsist, and of consequence he is still capable of taking by release. As where lessee for life underlets for years, or lessee for 21 years underlets for 20 ; the lessee for life, or the lessee for 21 years, may still take by release from their immediate lessors ; (y) and it is on this principle that tenant in tail who has made a *lease for his own life* only, or any conveyance equivalent to it, may still take by release from his donor.

But where the particular tenant has *assigned* over all his interest, the estate is clearly out of him, there remains no privity between him and the reversioner or remainderman ; and he is of course incapable of a release. (z) So, the privity of estate may cease, and the party be incapable of a release, even though to some purposes he be still tenant to the reversioner. As tenant by the curtesy who has aliened, and yet still remains liable to an action of waste : tenant for years who has been ousted of his term : tenant for life who has been disseised ; and who, though incapable of taking a release by way of enlargement, from defect of privity of estate, are still *very tenants*, and capable of a release by way of extinction of rent or services due from them. (a)

It is obvious, that where the reversioner or remainderman have assigned over or departed with their estate, they have no interest remaining in it which can form the subject of a release ; and there is a complete disruption of privity between them and the particular tenant.

(x) Shep. Touch, 323. Preston on Conv. 354.

(y) Co. Lit. 273. a.

(z) Co. Lit. 273. a.

(a) Lit. a. 454, 5, 6, 7, 8. 465.

Where there are three estates, as to A. for life or years, remainder to B. for life or in tail, reversion to C., it is clear that B. may by release enlarge the estate of A., or C. that of B., whether C. be reversioner or remainderman in fee.

It is also agreed, that when C. is *reversioner*, he may enlarge the estate of A. by release; for A. has both the privity and estate requisite:(b) but it has been doubted whether C. may do this when he is *remainderman* in fee; by the better opinions it seems that he may.(c) However this release of the fee on the first estate for years or life, will have the effect of excluding the intermediate remainder, where there is but one remainder intermediate, and that contingent. But if there be another intermediate estate which precedes and supports the contingent remainder, the remainder will be preserved, at least during the continuance of such particular estate.(d) Contingent remainders of trust, or equitable interests, do not admit of destruction by merger.

3. It is immaterial whether the relessor has an estate in possession,(e) reversion, or remainder;(f) or whether he is a joint-tenant, or tenant in common, coparcener, or seised by entireties;(g) but he must have a *vested* estate(h) of freehold or inheritance, in his own or his wife's right,(i) when the lease is conveyed by bargain and sale, as no one with an estate less than freehold can stand *seised* to a use.

Though a tenant in tail cannot stand seised of uses to commence in terms after his death, because then interfer-

(b) Co. Lit. 273. a.

(c) 2. Roll. Abr. 400. pl. 3.

(d) 2 Preston on Conv. 342.

(e) Co. Lit. 265. a.

(f) Shep. T. 321.

(g) 2 Preston on Conv. 271.

(h) Lit. a. 458.

(i) Co. Lit. 275. l.

ing with the better title of his issue ; and though in a conveyance *to* a tenant in tail, no use will be implied or result, but only what is expressed be executed, yet, no doubt is entertained that a tenant in tail may convey by a bargain and sale of a lease for a year, and release, subject to the avoidance of his issue.(*k*)

It is not sufficient that the relessor has a contingent remainder,(*l*) an interest by executory devise,(*m*) or a mere possibility of succession ; as in the case of an heir apparent or presumptive.(*n*)

Parties so situated may create estoppels ;(*o*) but they cannot make grants so as to *transfer* such interests ;(*p*) and a release by way of enlargement is, in its operation, a transfer. However a party who has merely a right of entry, or of action, as a disseisee or discontinuee, may release to the disseisor or discontinuor, by way of extinguishment of right. But a release by way of extinguishment of a right can only be made to one who has an estate of freehold.(*q*) And it is now established, that possibilities coupled with an interest are devisable,(*r*) may be released by way of extinguishment of right,(*s*) or be bound by way of estoppel.(*t*) In *equity* too, parties interested under contingent remainders and executory devises may bind themselves by contract for a valuable consideration. But though these interests may be transferable in equity, they are by no means grantable at law ; and where they

(*k*) 10 Rep. Seymour's case. 2 Lord Raym. 778. Machel v. Clarke

(*l*) 1. Fearn, 537. Co. Lit. 214. a.

(*m*) Shep. T. 238. 10 Rep. 8 b.

(*n*) Hob. 45. Lit. s. 446. Co. Lit. 965. a.

(*o*) Pollex. 54. Weale v. Lower.

(*p*) Co. Lit. 214. a.

(*q*) Lit. s. 447.

(*r*) 3 T. R. 38. Roe v. Jones.

(*s*) Co. Lit. 214.

(*t*) Pollex. 54.

are said to be assignable, it must be understood with this qualification.

Whatever is grantable is also devisable: but it does not therefore follow, nor is it the case, that whatever is devisable is also grantable.

A contingent interest to the survivor of several persons, or to persons who shall answer a given description and are not yet ascertained, *(u)* as *the children of A. who shall be living at his death*, though possibilities coupled with an interest are not devisable, *(x)* or releasable.

That expectancies may be bound by estoppel, is the consequence of a rule of law concerning titles, and not of any present interest in the parties. And though equity holds the contract of an expectant heir, who becomes heir *de facto*, binding on him; yet this equity is personal to the contractor, and does not bind *his* heir. *(y)*

4. In respect of *personal* qualification, any persons may take by lease and release, who are capable of a grant, and to the same extent as they are so capable; as, a married woman subject to the dissent of her husband; but no person can convey, where the lease for a year is transferred by bargain and sale, who is not capable of standing seised to a use. Therefore the king, *(z)* or queen, *(a)* cannot convey in this manner; and it having been long thought that a corporation could not stand seised to a use, it was considered necessary that when a corporation conveyed by lease and release, the lease should be at common law, and the lessee actually enter before the release could be made. But the better opinion seems to be, that though a corporation cannot *take*, for the purpose of standing seised

(u) 1 Fearn, 541.

(x) 1 Maule and Selw. 165. *Doe v. Tomkinson*, and see 8 East, 552. *Goodright v. Forrester*. An interest extinguishable by release, as a right of entry or action, not devisable.

(y) 2 Cha. Ca. 112. *Clayton v. Duke of Newcastle*.

(z) Bacon on Uses, 66.

(a) *Id.* 56.

ed to the use of *others*, yet they may *convey* their own possessions by way of use.(b)

Though a person attainted of treason cannot convey after the crime committed, by reason of the forfeiture which relates to that time: yet a person attainted only of felony or murder, may convey after the crime and before attainder, for this attainder has no such relation; and as the forfeiture in this case is only of the rents and profits for the life of the criminal, and the year and day waste from his death, his conveyance, even after the attainder, shall bind all persons but the king for his time, and the lord of whom the land is held when his time shall come.(c)

5. The conveyance by lease and release is only *absolutely* necessary in those cases in which it is substituted for a feoffment, or a bargain and sale *enrolled*. But it is usually adopted in a variety of instances, when a mere *grant* by a single deed would be sufficient; for it would be incumbent on the person who takes by such an assurance, to shew that there was a previous existing particular estate; and of this the party has evidence in his own hands, when his conveyance commences by a lease for a year. Rent charges, tithes, &c. may effectually be conveyed by lease and release, though it is usual, when they are conveyed separately from other property, to pass them by grant.(d) A lease and release of a remainder or reversion may be pleaded as a grant.(e)

A lease and release is an *innocent* conveyance; that is, more will not pass by it than the grantor really has;(f) and therefore it will not, like a feoffment, work a forfeiture or discontinuance. And when it is said that this conveyance countervails a feoffment, it is only understood

(b) 2 Leo. 121. 3 Leo. 175, Holland and Bonis's case. 1 Leo. 183. Sugd. - Gilb. on Uses, 2, 9.

(c) Perk. s. 26.

(d) Shap. T. 227.

(e) 2 Rep. 35. Heyward's case.

(f) Lit. s. 609. 606.

that it may, like a feoffment, convey an estate of freehold or inheritance in possession; and not that it has any of the collateral qualities of a feoffment, as divesting estates, &c.

Whenever any difficulty arises in giving effect to an instrument as a release, for want of privity of estate, or for want of any prior estate; and circumstances will admit of its operating in some other mode, as, a surrender, appointment, grant, or covenant to stand seised, confirmation, or release of right, the decisions of modern times, the general rules of construction, and the principles of law, justify the expectation that the operation of the instrument will be supported in such of those modes as will best give effect to the general or immediate object of the parties.(g)

Not only may uses be limited on the estate of the relessee, but it seems also, that where it is necessary, a resulting use may be implied to the relessor;(h) and that this is not what is called a use on a use. And if a release is made to a bargainee for a year, habendum to the relessee, his heirs and assigns, to the use of him and the heirs of his body, the statute would for the benefit of the issue, according to the limitation of the use, divest the estate vested in the relessee by the common law, and execute the same in himself in tail, by force of the statute.(i)

The lease and release are at this day always separate deeds, the lease bearing date the day before the release; but they may be contained in the same deed,(k) the lease may be dated at any length of time before the release, on the same day,(l) and will be supported even if by mistake, of a subsequent date: for a prior delivery may be averr-

(g) 2 Wils. 79. *Roe v. Tranmer*.

(h) Barn, Cha. Rep. 334. *Loyd v. Spillet*, 2 Atk. 148. See 7 Mod. 74. *Shortridge v. Lamplugh*, Sand. Ua. 485.

(i) 13 Rep. 56.

(k) 1 Freem. 251.

(l) *Ibid*.

ed, and a party may plead a deed as dated on one day and delivery on another.(m)

It is essentially necessary, that the person or persons, to whom the release is to be made, should be lessees in the lease; and though with respect to the lessors, in strictness the omission in the lease of those persons, who might transfer their estate by grant without livery of seisin, is not so material as to raise an objection to a title, (for the release may, as to some parties, operate as a release, and to others as a grant) yet from caution it is the uniform practice to make the cestui que trust, and all who are to join in the release, lessors in the lease.

Though in every bargain and sale there must be a valuable consideration, yet a peppercorn is sufficient to answer this requisite.(n)

With respect to the habendum; where the instrument is perplexed by a grant to one person, with an habendum to another, it may be collected from a late case, that the courts will modify in construction the different parts of the assurance, so as to carry the intentions of the parties into effect, as far as that can be done consistently with the rules of law.(o)

The recital of the lease in the deed of release, is good evidence of a lease against the lessor and those claiming under him;(p) but as to others it is not evidence without proving that there was such a deed, and that it has been lost or destroyed.(q)

As between a seller and his heirs, and a purchaser and his heirs, a court of equity will correct any error, by supplying the omission of parcels by mistake, or decreeing a

(m) Cro. Eliz. 890. House v. Layton, 3 Lev. 348. Stone v. Bale Com. Dig. Faits, b. 3. 10 East, 427. Doe v. Day.

(n) 2 Mod. 249. 1 Freem. 249,

(o) 3 East. 115. Spyve v. Topham.

(p) 6 Mod. 44.

(q) 1 Salk. 285.

conveyance of parcels included but not intended to pass. But on a conveyance by tenant in tail, the issue in tail or parties in remainder are not bound to supply any omission.

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THE LAW OF INFANCY.

CHAPTER I.

*Who are Infants, and what are the general
Disabilities imposed on them.*

In order to prevent, as far as possible, the evils which would arise from the imbecility and inexperience to which every man is subject on his entrance into the world, the legislature has imposed on him, for a given period, those disabilities, and endued him with those privileges, which, with their modifications, are implied in the legal acceptance of the term *infant*; and every person is, in our law, considered as an infant, until he has completed the age of twenty-one years.(a) (1)

(a) Co. Litt. 79.

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(1) Infancy is a personal privilege and cannot be taken advantage of by any, but the infant himself. *Hartness v. Thompson*, and others. 5 *Johns. Rep.* 160.

An infant owes reverence and respect to his mother; but she has no legal authority over him, nor any legal

(A man born the 1st of February, 1600, after eleven o'clock at night, was adjudged to be of full age after one o'clock on the morning of the last day of January, 1621.(b)

It must be observed, however, that the incidents which the law has attached to infants in their natural capacity, do not extend to them in the exercise of corporate or political functions; imbecility and inexperience are not supposed to form a part of those abstract existences, which are constituted for the mere performance of public service,(2) and so far as that is concerned, the natural properties

(b) 1 Salk. 44. for the law makes no fraction of a day. See Keb.589. Raym.84. 2 Mod. 281. Lord Raym.281.480.

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right to his services. *Commonwealth v. Murray*, 4 Bin. Rep. 487.

As to the right of a minor to support his father. Vide *Ansel v. M'Lellan*, 16 Mass. Rep. 30.

If a minor leave his father's house voluntarily, for the purpose of seeking his fortune in the world, or to avoid the discipline and restraint so necessary for the due regulation of families, he carries with him no credit, and he ceases to have any claim on his parent for the payment of supplies furnished to him. *Ansel v. M'Lellan*, 16 Mass. Rep. 30.

(2) An infant, under 18 years of age is not liable to be enrolled in the militia; and if, with the consent of his father, he agrees to go as a *substitute* for another into actual service for a certain sum of money, which is paid; such a contract is not binding on the infant; and if he afterwards desert the service, he cannot be compelled to return and an action of trespass and false imprisonment,

of the infant merge in his political capacity, "to which age is neither material nor imputable." (c)

Therefore, if the king, within age, consent to an act of parliament, (d) or make any lease or grant, (e) he is bound presently and cannot after avoid them, either during his minority, or when he comes of full age; for the king, as a body politic, cannot be a minor.

On the same principle, the acts of a mayor and commonalty shall be avoided by reason of the non-age of the mayor: (f) and if a parson, improperly admitted under age, make a lease with the due requisites, it shall be binding on his successor; for the parson

(c) Bro. Age.

(d) Co. Lit. 43. b. 1 Roll. Abr. 728.

(e) Plow. 213. a. 7 Co. 12.

(f) Cro. Car. 557. An infant may be a Mayor; and the acts by the Mayor and commonalty shall not be avoided by the nonage of the Mayor. Cro. Car. 556.

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will lie against a person, who apprehends and detains him as a deserter. *Grace v. Wilber*, 10 Johns. Rep. 453.

An infant is personally liable to a prosecution for neglect of duty as a member of a militia company: as the proceedings for the recovery of the penalty incurred are not *civiliter*, as upon a contract but *criminaliter*, for an offence against law. *Winslow v. Anderson*, 4 Mass. Rep. 376. *Dyer v. Hunnewell*, 12 Mass. Rep. 271.

Under the constitutional power of Congress to provide and maintain a navy, that body may, by law, authorise an infant to make a contract for service in the navy. *Commonwealth v. Murray*, 4 Bin. Rep. 487.

made the lease in his capacity of corporation sole.(g)

3. The following are the general disabilities imposed on an infant, for the security of others :

He cannot sit in the House of Lords, or be elected a member of the House of Commons.(h)

He cannot be a juror ;(i) and it is said by Hobart, that a person under forty-two cannot sit on a trial "de ætate probanda," because he would then try a matter which might have happened before he was twenty-one.

An infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop ; nor can he take a grant of those offices in possession or reversion :(k) not only because by intendment of law he hath not sufficient knowledge, experience, and judgment, to use the office, but also, because, by law, he cannot appoint a deputy. He cannot make a will of lands.(l)

An infant cannot be an attorney ;(m) nei-

(g) Bro. Age.

(h) 7 and 8 W. and M. c. 25.

(i) Hob. 325. Co. Litt. 157. a. 172. b.

(k) Co. Litt. 3. b. 1 Roll. Abr. 731. l. 40. 2 Roll. Abr. 153. March. 41. 43 Cro. El. 636. Cro. Car. 556.

(l) Dy. 143. Raym. 84. Sid. 162.

(m) Co. Lit. 128. a. Cro. El. 637. March. 92. That is, a *public* attorney, for prosecuting suits at law ; but he may be a *private* attorney ; as for the purpose of delivering seisin, or performing acts so merely ministerial that they may be done by the most ignorant. Co. Lit. 52.

ther can he be a bailiff, factor, or receiver; because he is not to be charged in any account.⁽ⁿ⁾ Nor can he be charged in equity farther than in law:^(o) and therefore if an infant be appointed factor, his friends should give security for his accounting.^(s)

An infant cannot be an administrator; because by the statute, a bond is required to ensure faithful administration, and the deed of an infant is not binding on him. For the same reason, if administration be granted during the minority of one who is entitled

(n) Co. Lit. 173. Latch. 169. Noy. 87. Palm. 528.
2 Roll. Rep. 271. 1 T. R. 40.

(o) Eq. Abr. 6.

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(3) An infant cannot elect to become a student, (without his father's consent) so as to charge him with the amount of a student's fee. 1 *Caines' Rep.* 28.

An infant alien cannot be naturalized on his own petition. *Le Forrestier's case*, 2 *Mass. Rep.* 419.

But *per Parsons C. J.* if a petition were offered by the parent or legal guardian of a minor, it might present the subject to the court in a different view. *Ibid.*

Whether an infant can be disseised and is then bound to bring his action within ten years after he comes of age, *Quere.* *Jackson ex. dem. Rensselaer v. Whitlock*, 1 *Johns. Cas.* 213.

An infant compellable by law to do service in the militia, may enlist in an independent company, and such enlistment will take him out of the standing militia company, in which he was enrolled. *Commonwealth v. Frost*, 13 *Mass. Rep.* 491

to it as next kin to the intestate, such administration does not determine till the infant's age of twenty-one.(p)

These two latter disabilities,(q) though operating to the security of others, clearly arise out of a disability imposed on, and a privilege allowed the infant for his own protection. What is the nature of this disability and this privilege will appear in the ensuing chapters.(4)

4. For the security of himself, he cannot(5) appoint an attorney,(r) state an account,(s) or, with the exceptions hereafter to be noticed, bind himself to the performance of any

(p) Carth. 446.

(q) i. e. of being bailiff or administrator. The disability, that of stating an account; the privilege, that of avoiding his bond.

(r) Roll. Abr. 287.

(s) Co. Lit. 172. 1 T. R. 40. 1 Roll. Abr. 129. Co. Lit. 281.

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(4) An infant whose father is dead, and whose mother is again married, is entitled to his own earnings and may maintain an action to recover them. *Freto v. Brown*, 4 *Mass. Rep.* 675.

The mother of an infant child, whose father is dead, is not compellable to support such child if the child have sufficient estate for its own support. *Whipple v. Dow and ux.* 2 *Mass. Rep.* 415. *Dawes, Judge, &c. v. Howard et al.* 4 *Mass. Rep.* 97.

(5) As to the power of an infant to appoint an attorney, Vide 14 *Mass. Rep.* 461, 462.

act or contract, by deed or parol.(6) This latter incident of infancy, constitutes a privilege or a disability, accordingly as the infant's act is considered voidable or void.

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(6) No question appears to have been made in our courts, or those of England, as to the competency of infants to be partners in a commercial concern with an adult; so as to be able to give authority to the adult to sign for the concern. Partnerships have not been uncommon between adults and infants; and simple contracts signed by one for both, undoubtedly have been often made. *Whitney et al. v. Dutch et al.* 14 *Mass. Rep.* 461.

CHAP. II.

What acts of an infant are void, and what voidable.

THE method taken in law to protect an infant against the effects of his own weakness, has been, to consider his acts as not binding (a) and to allow him to rescind all contracts; (with the exceptions which are specified in chap. v.) (1)

But there are two degrees in which his acts or instruments appear to be not binding.

(a) 29 E. 3. 20. b. 1 Roll. Abr. 729. Co. Lit. 172. 281.

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(1) Infants are supposed to be destitute of sufficient understanding to contract. The law therefore protects their weakness and imbecility, so far as to allow them to avoid all their contracts by which they may be injured; but in favour they are bound by all reasonable contracts for their maintenance and education, and also by all acts, which they are obliged by law to do. *Baker v. Loret, 6 Mass. Rep. 78.*

The law will not permit the privilege of an infant to be made the engine of fraud and injustice; and if he receive a compensation for any injury, and afterwards bring an action to recover compensation for the same injury, he shall recover nominal damages only. *Ibid.*

First, by being considered as if they had never existed, that is, *wholly* void. Secondly, as being defeasible, at the election of the party with whom they originated, that is, *voidable* only.

A *voidable* act is binding on others, until disaffirmed by the party with whom it originated ;(b) it is also capable, at a proper time, and by proper means, of being confirmed or rendered valid.(b)

A *void* act never is nor never can be binding, either on the party in whom it originates, or on others ; all who claim through or under it, must fail,(c) and it never can at any time or by any means be confirmed or rendered valid.(c)

It becomes, therefore, of the highest importance(d) to ascertain, if it be possible, what acts of an infant are void, and what merely voidable.

Two rules are given in the books to assist us in coming to such conclusion ; but neither of them, on examination, will be found satisfactory.

(b) Example: a lease for years of land, taken by an infant, and occupation under it after he comes of age. Cro. Jac. 320. *Ketsey v. Elliott*.

(c) Example: a will of land (testator being dead) not properly attested according to the statute 29 Car. 2.

(d) See post—any party interested may take advantage of a void act of the infants ; but only the infant himself or his representatives can take advantage of his voidable acts.

The first is to be found in Perkins,(e) "That all gifts, grants, or deeds, made by infants, which do *not* take effect *by delivery of his hand*, are *void*; but all gifts, grants, or deeds, made by infants, by matter in deed or writing, which do take effect by delivery of his hand, are *voidable*, by himself, by his heirs, and by those who have his estate."

Now, if the first part of this rule held good in all cases, a parol lease for years made by an infant, would be absolutely void; but if the infant could recover in an action for rent arrear, on such lease, (which cannot be denied)(f) it is clearly only voidable.

Besides, the rule comprehending only gifts, grants, and deeds, is not sufficiently extensive for general application.(g)

(e) Sect. 12.

(f) 18 E. 4. 2. 1 Mod. 25.

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(2) Infants may avoid the sale of their lands, or any contract or agreement to surrender or release their rights, for which they are entitled to an equivalent; because it is a presumption of law that infants have not sufficient discretion to put a just value on their own rights. *Baker v. Lovett*, 6 Mass. Rep. 78.

D. an infant, in 1784, conveyed a lot of land in the military tract to M. and arrived of full age in 1785, and afterwards, in 1791, without having made an entry on the land, or done any act to avoid the deed to M., executed another deed of the same land to B.; whether this deed avoided the first deed, Quere. *Jackson ex dem. Dunbar and others v. Todd*, 6 Johns. Rep. 257. 11 Johns. Rep. 539.

The second rule is, that those acts are *void*, in which there is no semblance or benefit to the infant: those from which he may receive benefit, *voidable* only. However, it has been holden, that if an infant grant a rent charge out of his land, this is not absolutely void, but voidable only,^(g) because the deed was delivered with his own hands.⁽³⁾

(g) 3 Mod. 310. in note. 6 Annæ. B. R. *Hudson v. Jones*. 3 Bac. Abr. 601. Infancy (I.) 3. *Viner and Comyn* both lay it down, that such a rent-charge is absolutely void; and both quote for their authority *Perkins* s. 13. 17. 3 Mod. 310. *Perkins* vouches for his authority,

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Though the deed of the infant D. was voidable, yet T. a purchaser under B. could not avail himself of the second deed to B. to avoid the first deed to M. *Ibid*.

A deed of bargain and sale by an infant is not void but voidable. No person except the infant and his legal representatives can avoid such a contract. A deed and a mortgage back of the same date to secure the consideration money, must be considered as one transaction; and if the latter be avoided on account of infancy, the former becomes of no effect—What acts of an infant amount to an avoidance of his deed. *Roberts v. Wiggin*, 1 *New-Hampshire Rep.* 73.

(3) An entry is not in all cases requisite by a grantor to avoid a deed executed by him during his infancy. *Jackson v. Carpenter*, 11 *Johns. Rep.* 509.

Where an infant, in 1784, conveyed lands in the military tract, and afterwards in 1794, having arrived at full age, conveyed the same lands to another person, and such conveyance was registered; it was held, that the land be-

Besides, how can it be ascertained from the act or instrument itself, whether benefit or detriment will eventually accrue from it? (4) A bond with a penalty, given by the infant,

Pasch. 18 E. 4. 2. where *no such position is to be found.* The position in 3 Mod. 310. (Thompson v. Leach) is an obiter dictum, and immediately preceded by an assertion "*that the grants of infants and idiots are parallel both in law and reason.*" However the authority of that assertion has since been denied by Lord Mansfield. 3 Burr. 1807. Zouch v. Parsons. Besides which, if a grant were made by a non compos, only his heir could have a writ of "*Dum fuit non compos;*" but where an infant makes a grant, either he, or his heir, may have a writ of "*Dum fuit infra ætatem.*" Co. Lit. 247. b. The one may aver his infancy, but not the other his lunacy, &c. so that their grants are by no means parallel as to their consequences.

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ing waste and uncultivated, he was not concluded by the lapse of time, and that an entry was not necessary to avoid the former deed, which (not being a feofment) might be avoided by a deed of the same nature and of equal notoriety. *Ibid.*

(4) In a more recent case decided in Massachusetts, the rule and the distinction are laid down by Wilde J. as follows. "It has been said that all acts of an infant which are *apparently* prejudicial to his interests, are void and may be treated as nullity; but it would seem the more correct course to say that those acts of an infant are void which not only *apparently* but *necessarily* operate to his prejudice. The benefit to the infant is the great point to be regarded; the object of the law being to protect his imbecility and indiscretion from injury through his own

(than which nothing can be *apparently* less beneficial to him) might be the condition ignorantly required before investing him with a valuable office. Perhaps it may not, even at this day, be unsuccessfully contended, that few, if any, of an infant's acts are absolutely void.

This position will be maintained on three grounds :

First, on the *principle* of the law relating to infants ;

Secondly, on the rules of pleading ;(h) and,
Thirdly, on a review of the cases.

(h) Lord Coke, says, " One of the best arguments or proofs in law, is drawn from the right entries or course of pleading." Co. Lit. 115. b.

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imprudence or the craft of others. The general rule is, that infancy is a personal privilege of which no one can take advantage but the infant himself ; and therefore that his contracts though voidable by him shall bind the person of full age. This rule seems to require that all contracts of infants should be held *voidable* rather than *void*. but however this may be, all the books agree that those which are *beneficial* or have a *semblance* of *benefit* to the infant are only *voidable*. Of this character are sales made by persons of full age to infants. *Oliver v. Houdlet*, 13 *Mass. Rep.* 240. Vide also *Whitney v. Dutch et al.* 14 *Mass. Rep.* 461.

An enlistment by a minor in an independent company of the militia is not *void* but *voidable* by the minor. *Commonwealth v. Frost*, 13 *Mass. Rep.* 491.

First then, to protect the infant against the effects of his own weakness, appears clearly to be the principle of the law ;(5) and if this protection can be effectually secured to him by any means short of inflicting a detriment on innocent persons, such infliction must be unnecessary and unjust. Now, to consider any acts of an infant *absolutely void*, might indeed operate to the protection of the infant, but it would in many cases seriously, affect the rights of persons in nowise implicated in the infant's transactions, and might not unfrequently be prejudicial to the infant himself.

Surely it would be a greater indulgence to the infant and more for his advantage, to allow him, when he comes of age and is capable of re-considering what he has done, either to ratify and affirm all his deeds and contracts, or to break through and avoid them ;

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(5) If an infant submit his rights to arbitration, he will not be bound by the award, from a presumed incompetency to choose suitable arbitrators. *Baker v. Lovett*, 6 *Mass. Rep.* 78.

So if he attempt himself to ascertain the damages, he cannot be obliged by this act although he may have received the damages he claims ; for they may be extremely inadequate to the injury, and the law will protect him as well against himself as against others. *Ibid.*

The object of the law in disabling infants from binding themselves, is to prevent them from being imposed upon by the crafty and designing. *Whitney et al. v. Dutch et al.* 14 *Mass. Rep.* 463.

and that this power should be extended, as well to those acts which may turn out to the infant's disadvantage, as to those which are apparently beneficial; for if the privilege(*i*) be confined only to acts attended with advantage, (*j*) it would be worse than nugatory; if denied to acts apparently or even really prejudicial, it would be no privilege at all, or at most an empty and idle one. (6)

The giving infants such power in general over all their acts, will sufficiently secure them against the danger of being over-reached by others; for when the power is general, and all persons who deal with an infant know they are to be at his mercy, this will take off from the temptation of imposing on him: or if

(*i*) It is equally to the security of the infant, and more to his advantage, that by considering his acts voidable, we should give him the *privilege* of avoiding, (which implies also that of confirming) them, than that by considering them void, we should lay him under the *disability* of acting at all, and place him on a level with idiots and lunatics. See Post.

(*j*) Which it is not; for, generally, such acts are absolutely binding on him. 5 Br. P. C. 570. 2 T. R. 161.

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(6) A manumission of a slave by an infant, though with the approbation and consent of his guardian, is voidable; but the manumission though defeasible, is in the mean time valid, the slave so manumitted is a competent witness; the power of the infant to revoke the gift or coming of age is an objection to the *credit* of the witness only. *Executors of Rogers v. Berry*, 10 Johns. Rep. 132.

any should be so hardy as to attempt it ; yet, since the infant is at liberty to rescue himself by avoiding the injurious contract, it seems no possible mischief could arise by suffering it in the mean time to hang in equilibrio, and deferring to pronounce any sentence upon it, since that, as it hath been shewn, would curtail the infant's privilege, and take off from his freedom of judging at all.(7)

Secondly: Any thing which at common law renders a deed absolutely *void*, as rasure, interlineation, alteration, coverture, or lunacy at the time of execution, may be given in evidence under the general issue of "*non est factum*:"(k) the instrument, under such circumstances, is considered as if it had never existed, and in that view, "is not the deed of the defendant." But infancy must be pleaded specially,(8) and cannot be given in

(k) 11 Rep. 27. a. 5. Rep. 119. b. 12. Mod. 609. Str. 1104.

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(7) It may be assumed as a principle, that all simple contracts made by infants which are not founded on an *illegal consideration*, are strictly not void but *voidable*, and may be made good by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant and if instead of avoiding he confirm them, when he has a legal capacity to make a contract, they are, in all respects, like contracts made by adults. *Whitney et al. v. Dutch et al.* 14 Mass. Rep. 462.

(8) The infancy of the plaintiff is not a ground of non-suit at the trial, but must be pleaded in abatement. *Schermerhorn v. Jenkins*, 17 Johns. Rep. 373.

evidence under the issue of "non est factum."
(l) The infant's deed, as existing to some purposes, (that is, to bind others at least) cannot be considered already void, or no deed at all, but must be *avoided* only by shewing the circumstances under which it was created. It is obvious that *this* reasoning is applied only to such *deeds* of an infant, as have sometimes been held to be void; and the argument is strengthened by the inference to be drawn from the rule given by Perkins ;(m) viz that the solemnity with which such instruments are executed, by sealing and *delivery* out of the infant's own hand, is a *prima facie* presumption that all is right; and though afterwards, on circumstances appearing otherwise, the infant, for his own protection, is allowed to avoid instruments so executed, yet it would be too much to insist, in the face of such a solemnity, that the deed was void from the beginning, as if it had never existed.(9)

(l) 5 Rep. 119, a. Moor pl. 132. Cro. Eliz. 127. 2 Inst. 483. Poph. 178. Salk. 279. Lord Mansfield says, the reason is, not because it has the *form* of a deed (as alleged in 3 Mod. 310.) but because *it has an operation from the delivery*. 3 Burr. 1805.

(m) Sect. 12.

AMERICAN CASES.

(9) Whether the deed of a minor is *void* or *voidable* only on his coming of age. *Maine Rep. Vol. 1. 11. New-Hampshire Rep. Vol. 1. 73.*

We come in the third place to a consideration of the cases ; some of these will be found contradictory ; but it must be observed, that in the greater part of them, the protection of the infant being the only point in question, both the Court and the bar, so long as that object was attained, seem to have used at random the terms *void* and *voidable*, without any regard to precision.⁽ⁿ⁾ Very little, therefore, can be gathered from their expressions towards the solution of this question, except in those cases where the rights of third persons coming into consideration, the very point of discussion was, not the mere discharge of the infant, but whether his deed were void or voidable.

(n) As in Cro. Eliz. 920, the question is stated to have been whether the deed were *good* or *voidable* ; and the Court held it *void*, which word the reporter evidently uses in the same sense as the word *voidable* preceding.

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With respect to contracts under seal made by infants, they are in legal force as contracts until they are avoided by plea. *Whitney et al. v. Dutch et al.* 14 Mass. Rep. 462.

A deed of land by an infant would convey a seisin, and the grantee would hold his title under it until the infant or some one under him, should by entry or action avoid it. *Ibid.*

Warrant of Attorney—Feoffment, with Livery by Attorney—Account stated—Feoffment to Guardian—Will of Lands—Release of Debts by Infant Executor.

It has been decided(1) that a *warrant of attorney* given by an infant is absolutely *void*, and not merely voidable.(o) The ground of this decision probably was, that an infant being in the first place disabled from appointing an attorney, every such appointment when made must be altogether without effect.(p)

(o) 1 H. Bl. 75. *Saunderson v. Marr*, though the infant, being aware of the law, gave the warrent fraudulently. 1 Lev. 86, 87. *Russell v. Lee*.

(p) And therefore a feoffment by an infant, with livery by letter of attorney, is *void*. *Perkins* 13. 2 Roll. Abr. 2. Palm. 237. The attorney and feoffee in such case would be disseisors, but not the infant. 2 Roll. Rep. 242. 2 Inst. 483. a warrant of attorney to *accept* livery, was held only *voidable* as being so clearly for the infant's advantage. *Noy*. 130. 1 Roll. Abr. 730.

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(1) A person having conveyed his lands when an infant, may avoid his grant by an act of equal solemnity and notoriety, as if it was a *feoffment with livery* by entering on the land and making known his dissent; if it was a bargain and sale by subsequent bargain and sale. *Jackson ex. dem. Brayton and Dunham v. Burchin*, 14 Johns. Rep. 124.

Notice to a subsequent grantee before the execution of the conveyance, of a prior grant made by the grantor when an infant, does not render his deed fraudulent and void, and if the prior grantee never was in possession, it is not an act of maintenance. *Ibid*.

But the Court gave no reasons for the decision. The reason may be, that such an instrument is incapable of ratification. The same attorney, it is true, may be continued after age, but it must be by a new warrant.—See post, Sect. 9. However, cases may occur in which it will be found very inconvenient to maintain that even a warrant of attorney is absolutely void.(e)

It is clear that an infant cannot be bound by an *account stated*, and that a plaintiff must fail in an assumpsit on such account.(q) But whether it be *void*, or only *voidable*, does not appear by any decision. Perhaps it may be successfully contended, that such an account is absolutely *void*; if not on the above ground of previous disability, (which is not altogether

(q) 1 T. R. 40. Co. Lit. 172. Even though the particulars of the account were for necessities. 1 T. R. 42. for the issue on the account stated, would pass by the true object of inquiry, viz. whether the articles furnished were necessities.

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(2) When an infant conveys land a bare admission of the fact by him when he arrives at full age, is not an affirmation of his act. *Jackson et. al. v. Barchin*, 14 Johns. Rep. 124.

Where an infant bargains and sells land to A. and after coming of age bargains and sells the same land to B., this is a revocation of the former grant, admitting that the first deed was *voidable only* and not void. *Ibid.*

satisfactory)(*r*) yet, from the nature of the transaction itself, which does not admit of reference or reconsideration without becoming substantively a new act, and is therefore incapable of ratification, the chief of a voidable act. Thus, if an infant state an account, and after he comes of full age agrees to abide by such account, this agreement is rather a new accounting, than a ratification of the old. And, therefore, if the agreement after age be binding, it cannot so accurately be said that a voidable act has been ratified, as that a new and valid act has been done.

A will of lands made by an infant, may perhaps, for the same reason, be considered as absolutely void,^(s) rather than voidable. A republication of the will after the infant came of age, would in fact be the first creation of it; for, had the infant died within age, or after age, without republishing the will, no devisee could have taken under it, any more than if it never had existed.

(*r*) For on what is the previous disability grounded, but a consideration of the infant's weakness? a consideration which applies equally to acts, confessedly only voidable. If an infant enfeoff his guardian, this is void on the very principle of law for the infant's protection; for if such an act were in any ways capable of confirmation, it might obviously become a motive with the guardian for oppressing the infant. That such an act is void, see 1 Roll. Abr. 728. 35 Ass. 8. And on the same principle, it seems, that any conveyance by an infant to his guardian, must be absolutely void.

(*s*) 1 Sid. 162. Dy. 143. pl. 56.

A *release of debts* by an infant executor is void, for administration is only committed to the infant *sub modo*, and his power does not extend to the release of debts, though he may give a valid acquittance when they are paid.^(t)

Parol Promises and Contracts.

2. From one strong case, and the general rules of pleading, there seems good ground to contend that the *parol promise* or *contract* of an infant is absolutely *void*.⁽³⁾ However, the arguments in favour of its being only *voidable*, appear the stronger of the two.

In *assumpsit*, which is an action brought on *parol promises* or *undertakings*, express or implied, *infancy* may be given in evidence under the general issue "*non assumpsit*." And in *Derby v. Boucher*,^(u) the Court ex-

(t) 5 Rep. 28. Russell's case.

(u) 1 Salk. 279. In *Popham*, 178, Jones J. says, the infant may plead "*non assumpsit*," *because his promise is void*. But great latitude is given to the general issue in "*assumpsit*," from the very nature of the action, which being applicable only to contracts and instruments of a less defined and tangible nature than *deeds*, would, if such latitude were not allowed, give rise to a new and intricate special pleading, such as could never exist in the beaten and confined system which is used in actions on *deeds*.

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(3) Under the act of Congress authorizing the President of the United States to cause to be engaged certain able seamen, ordinary seamen and *boys*, to serve in the navy,

pressly held, that infancy might be given in evidence under the general issue "non assumpsit," *because* the infant's promise was absolutely void, and not merely voidable, as a deed, which taking effect by delivery, is a more deliberate act.

In aid of this position too is the first part of the rule given by Perkins,^(w) "that a bare agreement to deliver, is void; actual delivery only voidable." But in the case (from the year books) put in elucidation of this by Bacon, the promise or agreement was void; not because made by an infant, but because there was no consideration for it; and so would have been equally void for a person of full age; it was a bare agreement to *give* a horse. So, a promise by an infant to pay, on an account stated, is void in the first instance, certainly for want of consideration; the account itself being void, could not form the subject of a consideration.⁽⁴⁾

(w) Sec. 12. 19.

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an infant who has arrived at the years of discretion, and has neither father, master, nor guardian may make a valid contract to serve according to the act, notwithstanding he has a mother with whom he resides and whose consent was not given. *Commonwealth v. Murray*, 4 *Binney's Rep.* 487.

(4) An infant living with his father is not liable on a charge for goods delivered him. *Wailing v. Toll*, 9 *Johns. Rep.* 141, 16 *Mass. Rep.* *Angel v. McLellan*, 32.

The case of *Darby v. Boucher*, was a hard case upon the infant, (an attempt to make him pay for goods furnished his wife, *dum sola*) and the Court might have strained a point to get him off. At any rate the case is met by that of *Southerton v. Whitlock*,^(x) in which it was decided, that if goods, *not necessities*, are delivered to an infant, who after full age ratifies the contract,—he is bound. This must have been decided clearly on the ground that the implied promise of payment arising on the delivery of the goods, was only a *voidable* and not a void undertaking; for had it been absolutely void, it never could have become the subject of ratification. Nor is this case impugned by that of *Stone v. Withipoll*,^(y) in which an executor sued on a promise to pay the debt of his infant testator, for goods, *not necessities*, was held not liable; ⁽⁵⁾ for the infant having died before he could ratify the contract, was in fact, whether his contract were void or voidable, never chargea-

(x) 1 Str. 690. S. P. per Holt, C. J. in *Hylling v. Hastings*. 1 Lord Raymond, 389.

(y) Cro. Eliz. 126.

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(5) If a person have entered into a contract while an infant, his executor or administrator may plead his infancy in bar of an action brought on the contract. *Smith v. Mayo et al.* 9 Mass. Rep. 62, *Martin v. Same*, 10 Mass. Rep. 137, *Jackson v. Same*, 11 Mass. Rep. 147, *Hussey et al. v. Jewett*, 9 Mass. Rep. 100.

ble,(z) and so *no consideration* could exist for the executor's promise.

In the case too of *Tapper v. Davenant*,(a) a ratification after full age, of an infant's contract for goods, not necessities, failed; not because the implied promise on originating the contract was incapable of ratification; in other words, not because the parol contract itself was absolutely void, for that position was not even advanced; but because the consideration set up for the ratification, had disappeared. A bond having been given by the infant during his minority, for the amount of the simple contract debt, the giving of the specialty was held so to have extinguished the simple contract debt, as not to leave a sufficient consideration for an express promise after full age, concerning the goods, to operate upon.

If the promise made *by* an infant were absolutely void,(6) it would form no considera-

(z) The Court certainly said, that a promise by the infant was void, though his bond was only voidable. Had a promise been made after full age to discharge a debt contracted for the infant's security, the executor had been liable. 4 Leon. 5.

(a) 3 Keb. 798. Bull. N. P. 155.

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(6) Where goods are sold to an infant on credit, and he avails himself of his infancy to avoid payment, the vendor may reclaim the goods as having never parted with his property in them. *Badger v. Phinney*, 15 Mass. Rep. 359.

As the infant would certainly recover in an action of debt for use and occupation, under a *parol lease*, granted by him, (c) it is clear that such grant cannot be absolutely *void*, though Viner states that it is so. (d) because the infant may bring an action of trespass against the lessee : but in the very case which is quoted as an authority for this position, it is expressly stated, that the infant may bring an action of trespass against his lessee, or an *action of debt at his election*. (e) Now what does this privilege of election constitute, but a voidable act? It does not clearly appear in the year-book whether the lease were by *parol* or indenture ; but it will hardly be denied that the infant might bring an action of debt on the former ; (f) for, in the same case it is stated, that the infant, on a *sale of goods* by

of the preceding ; and if the root be cut off, the tree must fall. See Dyer, 143. b.

(c) 1 Mod. 25. per Twysden and Kelynge, J.

(d) Vin. Abr. Enf. G. pl. 1.

(e) 18 Ed. 4. 2. Gawdy, J. thought that a *parol lease*, even without any reservation of rent, (the lease being made to try a title) was only voidable ; the two other justices were against him. (2 Leon, 217.) It was afterwards decided that Gawdy was right, Noy, 130. 3 Burr. 1806. Lord Mansfield says, " the *lessee* can in no case avoid the lease, on account of the infancy of the lessor ; which shews it not to be void, but *voidable* only."

(f) In *Smith v. Bowin*, (1 Mod. 25.) Twysden, J. expressly says, that he knew an infant plaintiff who had recovered in an action on a *parol lease*.

him, may bring an action of debt, or trespass, at his election ; he may confirm the act by bringing debt, or avoid it by bringing trespass. From this authority, it is perfectly clear that the other party to the contract could not successfully plead the infancy of the plaintiff, or " nil debet." But if the contract had been, by reason of infancy, absolutely void, as if it had never existed ; either of those pleas would have barred the action. Here then we have another act which is only *voidable* ; and if the infant deliver the goods with his own hands, he cannot maintain trespass,^(g) though perhaps he might trover. If he were to bring trover or trespass, after being fairly paid for the goods, equity would relieve against him.^(h)

An infant *shopkeeper, who contracts for goods to sell again in the course of his trade,* ⁽ⁱ⁾ or an infant who *contracts for goods* ⁽⁸⁾ *not necessities,* ^(k) or who *borrow money,*

^(g) 21 Hen. 7. pl. 39. 26 Hen. 8. pl. 2. if he bails goods to his own use, trespass does not lie against the bailee.—1 Roll. Abr. 730. l. 20.

^(h) 1 Vern. 132. 2 Vern. 224. 2 Vez. 212.

⁽ⁱ⁾ 1 Roll. Abr. 729. Cro. Jac. 494. 2 Roll. Rep. 45. 2 Str. 1083. nor for work done in the trade by an under-workman, 2 Esp. 480.

^(k) Cro. Jac. 560. 2 Roll. Rep. 144. Poph. 151. Palm. 361. Gould. 68. Godb. 219. Leon. 114.

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⁽⁸⁾ On these points, Vide *Van Winkle v. Ketcham*, 3 Caines' Rep. 323, *Smith v. Mayo et al.* 9 Mass. Rep. 147.

though he afterwards actually lay it out in necessities, (l) are clearly not liable in an action for payment of the goods, or money. (9) But as nothing can prevent them, when of full age, from ratifying the contract if they choose it, by payment for the goods, and repayment of the money; or by a promise to that effect; (m)

(l) 5 Mod. 368. 1 Salk. 386, 7. 279. The lender must, at his peril, lay it out for him, or *see* that it is laid out in necessities; for it may be borrowed for necessities, and spent in a tavern. But if actually expended in necessities, the lender is in equity allowed to stand in the place of the tradesman; as in the case of money lent to a feme covert.—1 P. Wm.'s 559. Pr. in Ch. 502. *Harris v. Lee*, 1 P. Wms. 438. It seems too that an executor may pay an infant a legacy for the purpose of finding necessities, 3 Bro. Ch. Rep. 179. *Davis v. Austen*. In what case such payment may be made to the father, see *Cooper v. Thornton*, 3 Br. Ch. Rep. 96.

(m) 1 Str. 690. This ratification must clearly have a legal reference to the preceding contract, and thus be a confirmative and not a substantive act; for if it had no such reference, but were a substantive act, there would be an entire failure of consideration, and the party might rescind the promise made after age; which, from the case above, and many others, it is plain he cannot do.

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(9) An infant living with his father is not liable even for necessities. *Wailing v. Toll*, 9 Johns. Rep. 141.

An infant at home and supported by his father, is not liable even for necessities. Those who supply him, do it at the risk of the child's ability or the father's willingness to indemnify them. *Angel v. M'Leellan*, 16 Mass. Rep. 31.

such contracts must be deemed only *voidable*, and not absolutely void.

A contract to serve, entered into by an infant slave in the West Indies, was held only voidable by the infant at most. (n)

3.—*Bonds.*

It appears to have been long considered that the *bond* of an infant is absolutely void ;(1) but there is no decision, (as will be shewn) that expressly establishes this position ; and there are very good grounds for thinking such an instrument only voidable. On the authority of Perkins,(o) and the obiter dictum in *Thompson v. Leach*,(p) Comyn lays it down, that generally the *deeds* of infants are void.(q) We have seen(r) that little attention is to be paid to the dictum in *Thompson v. Leach* ; and there is an obiter dictum in Noy. 85. to the same effect : but the word “ void,” as used by him in that passage, seems merely to imply “ not binding.” Perkins has, on this

(n) 2 H. Bl. 5. 11. *Keane v. Boycott.*

(o) Sect. 13.

(p) 3 Mod. 310.

(q) Com. Dig. Enf. C. 2.

(r) Ante, p. in note.

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(1) In New-York it has been decided, that a bond executed by an infant is void, although he alleged at the time of its execution that he was of full age. *Conroe v. Birdsell*, 1 Johns. Rep. 127.

subject, ascribed to the year-books, positions which they do not contain.(s)

Let us again recur to the principle that a void act is as if it had never existed, and cannot by any possible means be confirmed, or rendered valid; while an act merely voidable may be set aside, or affirmed at the election of the agent.

If an infant, having given a bond for goods not necessaries, after age promise to pay the whole, or a part of the principal or interest due on such bond, he is immediately bound by such promise.(t)

The bond, therefore, must form a consideration for the promise; but had the bond been absolutely void, it could have formed no consideration,(u) and the promise would have been without effect.

(s) *Anté*, p. in note.

(t) 2 T. R. 776. 3 Leon. 164. 4 Leon. 5.

(u) In the case of *Morning v. Knop*, (Cro. El. 700.) post which was adjourned and *never decided*, the want of consideration alleged, was no proof whatever that the bond was void. A person of full age promises to pay a sum in consideration that plaintiff will forbear to sue him on a bond given in infancy. Now as defendant at all events was not chargeable against his will, on such bond, he could gain no benefit, and plaintiff could suffer no detriment by forbearance to sue; and so, without going to the bond, forbearance was a bad consideration for such a promise. Had the promise been a substantive promise to pay the amount of such bond, the decision had been otherwise. 3 Leon, 164.

To the objection that the *goods* formed the consideration, it may be answered, that the goods, not being necessities, the plaintiff was as much discharged by law from payment for them, if he chose to refuse it, as from payment of the bond: besides the bond having been once given, the simple contract debt was absolutely merged in it, and could never again exist as a consideration for any future transaction.(x)

It has already been shewn,(y) that the absence of apparent benefit on the face of the instrument, is not, and ought not, to be any criterion by which we should decide, whether the deed is void or voidable.(z) In confirmation of that position, we may here adduce a judgment of Judge Ashhurst's, in which he advances, that a security given by an infant is only *voidable*, and may be revived by a promise after he comes of age. That he is bound in equity and in conscience to discharge the debt, though the law would not compel him to do so; but he may wave the privilege which the law gives him for the purpose of securing him against the imposition of designing persons; and if he choose to wave his privilege the subsequent promise

(x) 3 Keb. 798. Bull. N. P. 155.

(y) Ante, p. ; also, post,

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(z) Vide *Oliver v. Houdlet*, 13 Mass. Rep. 240. *Whitney v. Dutch*, et. al. 14 Mass. Rep. 461.

will operate upon the preceding consideration.(z)

To such as think the position, (that the want of apparent benefit is no criterion by which we can judge whether an instrument is void or voidable,) not sufficiently established, this case, put by Ashhurst, J. is much stronger than the preceding one, of a bond for goods delivered ; for where a mere security for another is given by the infant, no benefit has accrued, or can accrue to him ; there is neither apparent nor actual advantage.

At all events, in one case, the very point came in issue, "Whether the bond of an infant, (on a debt for goods not necessities,(a) is void or voidable."

In assumpsit, special verdict finds obligation given for the same contract, for a coach and horses during infancy, and that the defendant, after the time of the obligation, at full age assumed : and by Gurdler, for the plaintiff, the obligation is void, and the first contract is now continued by assumpsit at full age ; sed curia contra. The *obligation is only voidable*; and extinguishts the contract ; so the assumpsit at full age is without consideration.(b)

It is also expressly laid down in Moore,(c) that the bond of an infant is voidable, and not void.

(z) 2 T. R. 766. Cockshott v. Bennett.

(a) See the next page.

(b) 3 Keb. 798. Tapper v. Davenant.

(c) Pl. 132.

Littleton(*d*) says the bond of an infant is voidable : Roll lays it down expressly that his bond is not void, but voidable : and in *Darby v. Boucher*,(*e*) the Court allowed that the bond of an infant is only voidable.

Before the statute of 4 Ann, c. 16. s. 13. the penalty of a bond being recoverable at common law, if an infant, (although allowed to enter into a *single* obligation for *necessaries*,)(*f*) entered into a bond with a penalty, for the payment of them, he was clearly binding himself to pay for more than the necessities furnished, and the law would never enforce such an obligation ; however, the courts in discharging him from it, seem clearly to have considered it rather voidable than void. The various dicta simply say, that such a bond is not binding on the infant. The principal case on the subject is reported thus :

The plaintiff had paid certain money for the necessary meat and drink of the defendant being an infant, and took an obligation in the double sum for the payment thereof ; and whether this were *good* or *voidable*, was the question ; and the whole court held it to be void ; but if he had taken an obligation of the very sum which he laid out for his necessary maintenance, it had been otherwise.(*g*)

(*d*) Sec. 259. ; and every deed, feoffment, grant, confirmation, or other writing. Littleton's expression is, "*poit estre avoyde*."

(*e*) 1 Salk. 279.

(*f*) See next page.

(*g*) Cro. Eliz. 920. *Ayliffe v. Archdale*. Moor, pl. 929.

Now the point here was simply the discharge of the infant, and not the precise question, whether the deed were void or only voidable ;(h) and at any rate, even if we had not the preceding authorities to sway us, and the consideration that a *single* bond for necessities was held *valid* ; it seems clear from the context, that the reporter uses the word "void," as an answer to, and in the same sense as "voidable," preceding ; that is, the court considered a single bond for necessities binding on the infant ; but a bond with a penalty, not binding ; or such as might be avoided by the infant. If the single bond for necessities had been thought voidable, (which it never was in those days)(i) there might have been ground for considering the bond with a penalty void. But the single bond being valid, it was sufficient for the infant's protection, and accordant with the other decisions, that the bond with a penalty should be voidable, and seems clearly the result of the case, as stated by Coke.

Since the statute 4 Ann, c. 16. s. 13. the penalty can make no difference.(k)

But there are two respectable authorities which lay it down that an infant cannot either by parol contract, or single obligation, bind himself even for *necessaries* in a sum certain ;

Moor simply says, judgment was given for the defendant.

(h) See ante, page

(i) See post, chap. v. p.

(k) But as to this, see 8 East, 331.

and that should he promise to give an unreasonable price, his *promise* could not bind him ; so that on this principle such a deed or promise would clearly be voidable. *(l)* However, there is a whole host of authorities which hold such a bond for *necessaries* valid. *(m)*

4. — *Leases.*

A grant *(n)* of a *lease for years reserving rent*, by an infant, or acceptance *(o)* of such a lease by him, is clearly only a voidable act ; and not even voidable, where for the infant's benefit. *(p)*

As to such a *lease, without any reservation of rent*, there are two obiter opinions *(q)* and one decided case, *(r)* which say that it is absolutely void. The case was decided by two justices,

(l) Cases in Law and Eq. 185. Godb. 219. Rearsby and Cuffer's case.

(m) See chap v. p. 209

(n) 18 E. 4. 2. 4. Leon. 4 Jones, Sir W. 157. where it is also decided that a lease of a copyhold, though void against the lord, is good against strangers.

(o) Cro. Jac. 320. Godb. 120. 1 Roll. Abr. 731. 2 Bulstr. 69. Brownl. 120. he may waive the term by not entering ; but if he enter on the land, he shall be charged with an action of debt during his minority, 2 Bulstr. 69.

(p) Per Buller, J. 2 T. R. 161. Maddon v. White.

(q) 1 Roll. Rep. 441. Hutt, 102.

(r) 2 Leon. 216. Moor, 105. Humphreston's case, (which is annulled by Noy. 130. and 3 Burr. 1806. see next page.) The judgment too, was on the *right* and *merits* of the case, and did *not* turn on the point of the *lease*.

Wray and Southcote, against Gawdy, who was clearly of opinion that the lease was only voidable. Both the opinions and the decision turn on the ground that in such a lease there is no semblance of benefit to the infant. But, as hath been before contended,^(s) to decide that an act is void, and thereby to render it utterly incapable of ratification at any time, only because it is *apparently* without benefit to the infant, is to take from him all power of judgment, and to place him on a parallel with ideots and lunatics. Nay, to hold that an act which may be prejudicial to him is void, (and consequently incapable of ratification by any means) but that an act which may be beneficial, is voidable, (and consequently liable to defeasance,) is first, to place the infant on a parallel with an ideot, by taking from him *all* power of judging for himself, and then to assume that he wishes to act like an ideot, by conferring on him a power, which he can only exercise to his own detriment, and of setting aside an act which is beneficial to him, which, after all, it seems he cannot do.^(t)

It is amply sufficient for the infant's protection, that an act which may be prejudicial to him should be held voidable, and so liable to defeasance by himself at any moment; and this allows him the reasonable exercise of that discretion, which must be nearly the same in quantity at twenty years and a half as at twenty-two.

^(s) Ante, p.

^(t) 5 Br. P. C. 570. 2 T. R. 161. post,

Before we come to authority, therefore, it seems by the stronger reasons, that if an infant make *a lease for years without any reservation of rent*, though this is apparently to his prejudice whilst he continues a minor ; yet, since he may either by assize or trespass^(u) recover the possession and mesne profits, and so make it whole ab initio, the lease is good in the mean time ; and the rather, because all the books agree that if rent be reserved on such lease, it would then be only voidable ; whereas such rent may be so small in proportion to the value of the land, that there may be more reason to adjudge it absolutely void, than if none at all were reserved ; (x) because in the one case the detriment is apparent, but in the other it may be so misrepresented and coloured over, as to deceive the infant, even when he comes of age, into some unwary act of ratification ; besides, that the infant when he comes of age may, if he think fit, make such lease for years without reserving any rent ; and why then may he not consent to and ratify such lease,^(y) though made before.

(u) 18 E. iv. 2.

(x) Very prejudicial leases may be made, though a nominal rent be reserved ; and there may be the most beneficial considerations for a lease, though no rent be reserved.

(y) This might be done (if the law permits it) by accepting fealty, which is incident to every such lease.

Rent Charge. Unequal Partition.

5. At all events the case of *Hudson v. Jones*, (z) (in which a *rent charge* granted by an infant, was expressly held to be only *voidable*,) and the opinion of Judge Ashhurst in *Cockshott v. Benett*,(a) (that a *security* for another, given by an infant, is only *voidable*, and may be confirmed at full age) seem entirely to overrule the notion in the old books, (b) that want of benefit apparent on the face of the instrument, or ultimately arising from it, is a criterion by which it may be decided that the deed of an infant is void ; and,

In *Rames against Machin*,(c) it is expressly adjudged, in conformity with Gawdy's opinion in *Humphreston's case*, that a *lease without rent made by an infant to try a title, is good enough*.

(z) Trin. 6 Annæ in B. R. 3 Mod. 310. in note. 3 Bac. Abr. 601. *Enfant*. (I) 3. An *unequal partition*, apparently so detrimental to the infant, is stated by Lord Coke to be only voidable, and that the infant has his election to confirm it at full age. Co. Lit. 171.

(a) 2 T. R. 766.

(b) *Humphreston's case* was decided on the ground of defect of *apparent* benefit to the infant ; for the lease being made to try a title, would ultimately have been to his advantage.

Nothing can be less *apparently* beneficial to the infant than a bond, and yet that is but voidable, see ante, 33.

(c) Noy. 130. The infant cannot plead "*non est factum*" on a lease, though no rent be reserved ; but must avoid it

Lord Mansfield expressed the same opinion in *Zouch v. Parsons*,^(d) and approved of the rule given by Perkins, ‘that such deeds of an infant as take effect by livery, are voidable only.’ To this may be added Littleton’s express opinion, that the deeds of infants are only voidable ;^(e) that of Lord Coke,^(f) who lays it down generally, without any mention of rent, that the lease of an infant is voidable.

Feoffment, Lease.

6. The *feoffment* of an infant, if he make livery in person, is in all cases only *voidable* ;^(g) and yet it might be made on as little consideration as a lease without rent.

What seems decisive is, that the lessee can in *no* case avoid the *lease*, on account of the infancy of the lessor, which shews it not to be void, but *voidable* only ; and it is better for infants that they should have an election.^(h)

by pleading infancy specially. (Bro. tit. Leases, 50. 5 Rep. 119. 2 Inst. 483. Moor, pl. 132. Poph. 178.) See the remarks on this, ante, page and Lord Mansfield’s observation on this head.

(d) 3 Burr. 1806.

(e) Sec. 259.

(f) Co. Litt. 308. a.

(g) Co. Litt. 380. Dy. 104. 2 Roll. Abr. 572. 4 Rep. 125. a. 8 Rep. 42.

(h) Per Lord Mansfield, 3 Burr. 1806.

Surrender.

7. From a misstatement of the case of *Lloyd v. Gregory*,⁽ⁱ⁾ it was long supposed that a *surrender* by an infant was absolutely void. But in truth, a new lease on which the surrender was to have operated, turning out in that case to be absolutely void, the cause, ground, and condition of the surrender failed, the case was at an end, the old lease continued, and the surrender *never came in question*.^(k)

Afterwards Lord Mansfield decided in *Zouch v. Parsons*,^(l) that the *surrender* of an infant is only *voidable*. His words are these:

“ I know of no judgment upon the ground that such a surrender is void. Most undoubtedly, the *other* party cannot say so. If an infant were to surrender an unprofitable lease, and after acceptance the premises should be burnt, overflowed, or otherwise destroyed, the *lessor* never would say the surrender was void. There is no instance where the *other* party to a deed can object, on account of infancy; consequently the infant may let the surrender

(i) As in Cro. Car. 502. 2 Roll. Abr. 24. Faits I. pl. 6. 495. Surrender, F. pl. 7. 1 Roll. Abr. 728; the true report is in Sir W. Jones, 405.

(k) Sir W. Jones, 406.

(l) 3 Burr. 1806, 7. where his Lordship asserts that the comparison between an infant and a lunatic (3 Mod. 310. *Thompson v. Leach*) is *not just*.

stand, *or* avoid it ; which proves it to be *voidable* only. If a *new* case should arise, where it would be more beneficial to the infant that the deed should be considered as void : if he might incur a forfeiture, to be subject to damages, or a breach of trust in respect to a third person *unless* it were deemed void, the very principle of the privileges and disabilities attached to infants would warrant an exception in such case to the general rule."

Exchange.

8. We have Lord Coke's authority that an exchange of land made by an infant is only voidable ;(*m*) because the occupation of the land taken in exchange, is tantamount to livery, and also in respect to the recompense.

Fine, Recovery, Statute, Recognizance.

9. It has always been held too, that judicial acts of the infant, such as *Fine*,(*n*) *Recovery*,(*o*)

(*m*) Co. Litt. 51. b.

(*n*) 2 Rep. 58. a. 10 Rep. 42. b. 1 Roll. Abr. 730. Dy. 220.

(*o*) 2 Inst. 483. and if he comes in as vouchee by guardian, he shall be bound by it. Cro. Car. 307. Hob. 197. 1 Roll. Abr. 731. 751, 752. Jon. 318. Godb. 161. 1 Leon. 211. 1 Sid. 321. Cro. El. 471, 2. Contra, 10 Rep. 43. a. the king upon petition may admit an infant to suffer a valid recovery by his guardian. 1 Ver. 461. Ley. 83. Com. Dig. Enf. B. 2. Salk. 567.

Statute, Recognizance, (p) are only *voidable*, and that (on account of the solemnity with which they are accompanied,) in a manner much more limited(*q*) than other acts.

An infant's sealing advantageous marriage articles jointly with his father, was held not sufficient to declare the uses of a fine and recovery, in which after age he joined with his father.(*r*)

Upon the whole, we may, from the authorities before us, come to the following conclusions :

That, with few, or no exceptions, those acts or deeds of an infant which operate or take effect from *livery* are not void, but only *voidable* ;

But it does not appear, that therefore all acts *are* void, which do *not*, (or because they do not) take effect from *livery* ; on the contrary, many such acts appear to be also only voidable ;

That all acts or deeds which are *beneficial* to the infant, are at most only voidable, by reason of the general exemptions attached to infancy ;

But it does not appear, that therefore all acts or deeds which are apparently or really unattended with benefit to the infant, or even detrimental to him, are for that reason

(*p*) 10 Rep. 43. a. Bend. pl. 123.

(*q*) See Chap. iii. post.

(*r*) 3 P. Wms. 206. *Nightingale v. Earl Ferrers*. Vide *Hales v. Risley*, 3 Keb. 326. 759. 818.

only absolutely void ; on the contrary, many such acts or deeds appear also to be only voidable.

The only safe criterion then, by which we can ascertain whether the act of an infant be void or voidable, is this,

That acts which are capable of being legally ratified, are voidable only : acts which are incapable of being legally ratified, absolutely void.

(By legal ratification, is meant, that the act supposed to constitute such ratification should be held a valid act, only by reference to the preceding act intended to be ratified ;

If the act supposed to constitute such ratification be not validated by reference to some antecedent, it becomes, not an act of ratification, but a new, independent, and substantive act.)

The criterion given appears at first sight a little like a *petitio principii*, or begging of the question ; and perhaps might be so, if the doctrine of *considerations* were not well and clearly established, or at least much better defined, than that of an infant's privileges and disabilities. An example or two will clearly shew its general applicability.

The criterion, as drawn from the doctrine of considerations, is co-extensive with that doctrine, and embraces not only the considerations arising from the possibility of detriment to another ; let us therefore put an instance of the latter description, as affording the strongest proof of the accuracy of this rule.

An infant enters into a bond or promissory note as a security for a third person, and after age promises to pay the obligee a part of the whole of the sum which may have become due on such instrument ; it is clear, that on such a promise the money may be recovered : (s) the law then recognizes the validity of the transaction ; but it can only do so by a relation to the preceding act, viz. the giving the security—had that act never existed, or had it been void in law, (which is the same as if it had never existed) the promise after age would have been a substantive and independent promise, unsupported by any consideration, and so incapable as “ nudum pactum ” of becoming the subject of an action.

The act of the infant then, though not absolutely binding on him, was, at a proper time, legally capable of ratification, and consequently only voidable.

Now if the infant had given a bond to induce a female to live in prostitution with him, (t) and after age had promised to pay the sum

(s) *Cockshtot v. Benett*, 2 Tr. 766. Per Ashhurst, J. 2 Str. 690. 1 Ld. Raymd. 389. post, c. v. s. 1.

(t) This act would be equally void for a person of full age ; indeed, the acts which are void by reason of infancy alone, seem reducible to five. Account stated, warrant of attorney, will of lands, feoffment to guardians, (or acts falling under the same objection as that,) and release of debts by infant executor. The ground on which these acts have severally been considered void, are discussed, ante, p. 19. The rule here laid down is merely intended to furnish

mentioned in such bond, that sum could not have been recovered by action.

The first act being absolutely void, the second could not be referred to it legally. In law, the second being an independent substantial act, was in this instance without consideration, and so not binding. The first act, therefore, was incapable of legal confirmation, and consequently absolutely void.

Thus too, where a warrant of attorney is given by an infant, from the very nature of the act, a repetition of it at full age is a new, independent, and substantive act, requiring no reference to the preceding act, and performed on sufficient consideration to stand by itself.

The same reasoning applies to an account stated: and as it is clear, that neither a warrant of attorney given, nor an account stated by an infant, can form a consideration for any act after age, they are incapable of ratification, and therefore void.

So, a will of lands made by an infant, if published after age, bears a new date, and becomes altogether a new instrument, the time of publication only being material, and not the time of transcription.

It follows too, from the rule laid down, that acts which are capable of ratification, and therefore only voidable, become void when deprived of that capability.

a criterion by which voidable acts may be distinguished from void; but it does not always constitute the ground of their being void, or voidable.

Thus a party of full age is generally allowed to confirm a feoffment, made by him when an infant: the feoffment of an infant, therefore, is in general only voidable.

But on account of the obvious consequences to which such a permission might lead, a party of full age is not permitted to confirm a feoffment made by him while an infant, to *his guardian*: the feoffment, therefore, of an infant to his guardian is absolutely void.

CHAP. III.

*By whom, at what Time, and in what Manner,
Voidable Acts are to be Avoided.*

THE privilege conferred by Law on Infancy, is a personal privilege, of which no one can take advantage but the infant himself ; and therefore, though the contract or deed of an infant be voidable, yet it is binding on a person of full age.(a) The indulgence which the law allows infants, to secure them from the fraud and imposition of others, can only be intended for their benefit, and is not to be taken advantage of by persons of riper years, who are presumed to act with sufficient prudence : were it otherwise, this privilege, instead of being a protection to the infant, might, in many cases, turn greatly to his detriment.(1)

(a) 1 Mod. 25. Leach's edition, (the fifth,) where all the authorities on this point are collected in the margin.

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(1) A minor being possessed of a promissory note payable to himself, and not negotiable, exchanged it with A. for a watch that was worthless. The next day he tendered the watch to A. and demanded the note, to neither of which A. acceded. The maker of the note being in-

Therefore, where an infant brought an action on a contract for the sale of some grass, the defendant was not permitted to arrest judgment, on the ground that the plaintiff, being an infant, the defendant was not bound by his agreement.(b) So on a promise to an infant to do such an act, in consideration that the infant promised to pay such a sum, in "assumpsit" by the infant, he had judgment, though the money was not paid; for the Court held that the infant's promise was only voidable at his own election, and not at the election of him to whom it was made.(c)

If a man of full age, and a female of fifteen, promise to intermarry, and after request by her he marries another woman, an action on the case lies against him for the violation of the contract; for, although it was objected that this was "nudum pactum," and not reciprocal, as the man could not compel her, while an infant, to perform her promise; yet, being voidable as to herself only, as she finds it for

(b) *Smith v. Bowin*, 1 Mod. 25.

(c) 1 Keb. 1. 1 Sid. 41. *Forester's case*.

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formed of the transaction, and receiving a discharge from the minor's father, gave a new note for the debt. A. afterwards passed the note to B. assuring him it would be paid. B. sued the maker of the note in the name of the minor, the original promisee, and the court held that the note was void from the rescinding of the contract by the minor.—*Willis v. Twambly in Error*, 13 Mass. Rep. 104.

her benefit, it shall bind him, being of full age.(d)

An infant set forth in an action of covenant, that she had covenanted to serve the defendant seven years, and that the defendant had covenanted to teach her to sing and to dance, and to find meat, drink, washing and lodging, but that the defendant, within the time, turned her out of the house, and did not teach her to sing and dance. It was objected, in arrest of judgment, that the covenants being reciprocal, and the infant not bound by her covenant, neither could the mistress be by hers. But the Court held, that though the contract might be avoided as to the infant, yet it bound her mistress, who was of full age.(e)

For the same reasons it seems agreed, as a general rule,(f) that none but the infant himself, or his representatives, privies in blood, can avoid a voidable(g) conveyance made by the infant.

(d) 2 Str. 937. Holt and Ward.

(e) 1 Sid. 446. 2 Keb. 623. Farneham v. Atkins; if an infant exchanges with another, and the other enters, the infant may have an assise.—18 E. 4. 2. 1 Roll. Abr. 730.

(f) 8 Rep. 42. b. Whittingham's case.

(g) For of a conveyance absolutely void, all persons interested may take advantage, as of the infant's feoffment by attorney; which, being void, the land will, if the infant die without heirs, come to the lord by escheat. (Whittingham's case, sub finem.) So, if tenant in tail within age, come in as a vouchee by attorney, in a common recovery, he, in remainder, may assign this for error. (1

Therefore, if an infant seised in fee, make a feoffment, and die, his heir may enter: and if seised in tail male, he make a feoffment, and die, his son, being heir general and special, may enter,^(h) If the infant be attainted of felony, after the feoffment, the issue is driven to his formedon; for his entry is not lawful in respect of his estate only, but of his blood, which is corrupted.⁽ⁱ⁾

And if such infant tenant in tail, have no sons but only daughters, his brother, being special heir "per formam doni," made to his father, may avoid the feoffment, because he is privy in blood, and has the land only by descent.^(k)

But this privilege of avoidance, attached to the infant and his privies in blood, is only co-extensive with the infant's estate: therefore,

If an infant be tenant in tail, and makes a feoffment in fee, and dies without issue, his collateral heir cannot enter to avoid this feoffment: for, although by his feoffment he gave fee-simple, yet when he died without issue, nothing descended to the heir, in respect of which he could enter. So, if lands be given to one, and the heirs female of his body, and he has issue a son, and makes a feoffment in

Roll Abr. 755. Bridg. 75. 1 Roll. Rep. 301. Cro. El. 732. Palm. 123. Allen 75.)

(h) 8 Rep. 42. b. 43. a.

(i) Co. Litt. 337. a. in Whittingham's case, 8 Rep. 42. and Palmer 254. it is said the issue may enter.

(k) 8 Rep. 43.

fee, and dies within age, without issue female, the son shall not enter in this case for the infancy, because no right descended to him. So, if an infant be tenant "pur auter vie," and makes a feoffment in fee, and "cestuy que vie," dies, the infant, or his heir, shall never enter upon the feoffee, but be in reversion or remainder.^(l)

And privies in estate shall not take advantage of the act of an infant : therefore,

If donee in tail, within age, make a feoffment in fee, and die without issue, the donor shall not enter,^(m) because there was privity between them only in estate, and no right of entry accrued to the donor by the death of the donee. So, if two joint tenants be in fee, within age, and one makes a feoffment in fee of his moiety, and dies, the survivor cannot enter, by reason of the infancy of his companion ; for, by his feoffment, the jointure was served, so long as the feoffment remains in force ; and therefore, in such case, the heir of the feoffor shall have "dum fuit

(l) 8 Rep. 43.

(m) Ibid.—In Palmer 254. Doddridge, J. thought the donor might enter, because he could not bring a "formedon," and therefore without entry, would have no remedy.

But it does not appear why, in such case, the donor should not bring his "formedon." If he could not bring it, because or while the feoffment of the infant was voidable ; yet there seems to be no reason why he should not bring it ; when, by the death of the infant without issue, the tortious feoffment was confirmed, or at least past avoidance.

infra ætatem," or shall enter into the moiety : but if two joint tenants be within age, and they join in a feoffment, in such case, a joint right remains in them ; and therefore, if one dies, the right shall survive ; the survivor shall have the right of the land as from the first feoffor ; and may enter, in respect of the right accrued to him.(n)

If an infant seised in right of his wife, make a feoffment and die, his heir cannot enter because no right descends to him ; but inasmuch as the baron, if he had lived, might have entered in right of his wife only, and not in respect of any right which he himself had ; the wife, (even before the 32 H. 8. c. 28.) might, in such case, have entered in her own right.(n)

But if the feme, being only tenant in tail, the baron within age, had made a gift in tail to another, by which the baron gained a new reversion in fee, and died ; the wife might enter, or the heir of the baron, who had a new reversion descended to him. But if the heir entered, as it could only be to defeat the tail given by the infant, his estate vanished ; and by operation of law, the feme was immediately seised of her old estate.(n)

If there be a tenant for life, remainder to an infant in fee, and they two join in a fine, the infant may reverse the fine as to himself, but it shall stand good as to the tenant for life ; for the privilege of the infant shall not ren-

(n) 8 Rep. 43. Lit. s. 634.

der the act of the tenant for life, who was of full age, ineffectual.(q)

Privies in law, as the lord by escheat, are equally incapable as privies in estate, of avoiding a conveyance made by an infant ; therefore,

If an infant make a feoffment, and die without heir, the lord shall not avoid it.(r)

The heir or executor, sued on the infant's bond, may avoid it by pleading the infancy of the obligor. The heir is privy in blood, and the executor stands exactly in his testator's place ; and both avoid the instrument in respect of the estate transmitted.

*Conveyance, and other matters of Record—
Fine—Recovery—Statute—Recognizance.*

2. As to the time and manner of avoiding voidable acts, we must observe, that the infant's privilege of avoiding acts performed with judicial solemnity, and constituting matters of record, (as fines recoveries, statutes, recognizances.) is much more limited than his privilege of avoiding matters "en pais," as they are called ; or acts not judicial.

The former, therefore, can only be avoided by the infant himself, and during his minority.

(q) 1 Leon. 115. 317. 2 Sid. 55. 2 Jon. 182. 3 Burr. 1802.

(r) 8 Rep. 44. But in this case, it appearing that the feoffment of the infant was made by attorney, and so absolutely void, the court resolved that the land should escheat.

if; as, if an infant levy a fine, (for example,) though the judges ought not to admit the knowledge of one under his disability; yet, having once recorded his agreement, as the judgment of the Court, it shall forever bind him and his representatives, unless he avoids it during his minority; that the Court, by inspection, may determine his age;(s) And the infant can only avoid fines and recoveries by writ of error, that the contract may be vacated with the same solemnity that it was entered into.(t)

Therefore, if an infant suffer a common recovery, in which he comes in as a vouchee in his proper person,(u) though this shall not bind him; but that he may in a writ of error avoid it because it is error;(x) yet, at his full age,

(s) Co. Lit. 380. Moor, 76. 2 Roll. Abr. 15. 2 Inst. 483. 2 Bulstr. 320. 12 Rep. 122. Yel. 155. 3 Mod. 229. But if, after inspection and proof, he dies before the fine is reversed, the heir may reverse it; for the court, having recorded the nonage of the conusor, ought to vacate his contract. Co. Lit. 380. Moor, 884. Keswick's case.

(t) Co. Lit. 380. 2 Inst. 483. 1 Roll. Abr. 731. 742. 2 Roll. Abr. 395. 10 Rep. 43. a. Cro. El. 471. Cro. Car. 307. Hob. 196. 2 Bulstr. 235. 1 Lev. 142. 2 Saund. 94. Vern. 461. 2 Salk. 567.

(u) See post, chap. 5.

(x) 1 Roll. Abr. 742. Styl. 246. But if an infant appear by attorney, and suffer a recovery, it may, for this error, be reversed after the infant comes of age; because it shall be tried by the country, whether the warrant of attorney was given under age or not; and not be tried by

he cannot enter into the land, and avoid it by entry, before he has reversed it by a writ of error; for judgments are not to be subverted by matter "en pais," without matter of record.

But if a feme covert, being under age, levies a fine which she afterwards wishes to reverse, she may be brought into Court by "Habeas Corpus," in order to her inspection; and it seems the fine may be set aside on motion, for the husband may not be willing, nor permit her to proceed by writ of error.(y)

And if an infant brings a writ of error to reverse a fine for his nonage, and his nonage, after inspection, is recorded by the Court, but before the fine reversed, he levies another fine to another, this second fine shall hinder him from reversing the first; because the second, having entirely barred him of any right to the land, must also deprive him of all remedies which would restore him to the land.(z)

It is laid down too in Moor,(a) that if an infant levy a fine, and the conusee render to him, either for life, or in tail, that the infant shall have no writ of error to avoid this fine; because the reversal of the fine being only to

inspection of the court, like the fact of nonage. 1 Lev. 142. 2 Mod. 209. 1 Sid. 321.

(y) 2 Vent. 30. 1 Mod. 246. 3 Lev. 36.

(z) 1 Roll. Abr. 788. sed quære; unless the second fine were levied after age.

(a) Moor, 74.

restore him to the land he parted with by the fine, it would be fruitless to give him a writ of error, since he could not thereby be restored to the land which the very fine he would endeavour to reverse, had before given. Sed quære ; for the object of the reversal of the fine must be to restore him to the same estate in the land, as well as to the land itself.

But where an infant acknowledged a fine, and the conusees omitting to have the fine engrossed until he came of age, in order to prevent him from bringing a writ of error, the Court, upon view of the conusance produced by the infant, and upon his prayer to be inspected, and his age examined, recorded his nonage, to give him the benefit of his writ of error, which he must otherwise lose, his nonage determining before the next term. (b)

The infant can avoid a statute or recognizance only by "*audita querela*," during his minority ; (c) for these contracts being entered into under the inspection of the Judge, who is supposed to do right, the infant cannot aver his privilege, but must reverse them by a judgment of a superior court ; which, by inspection, hath the means to determine

(b) Moor, 189. Cro. Jac. 280, 1.

(c) Moor, pl. 206. 2 Inst. 483. 673. Co. Lit. 300. Keil. 10. 10 Rep. 43. a. Dy. 282. F. N. B. 105. Noy. 16. Cro. Jac. 5. 2 Roll. Abr. 57. 2 Bulstr. 320. 3 Mod. 229. The infant may bring an "*audita querela*," to avoid a statute, although it be not certified or returned in any court. And. 228. 3 Bulstr. 307.

whether the inferior jurisdiction has done right or no.

If A. being within age, becomes bail for B. and after two "Sci. Fa." and "Nihil" returned, judgment is given against A. he may avoid the recognizance by "audita querela;" and the judgment upon the recognizance shall be avoided of consequence.(d) Where an infant bail, taken in execution, brought an "audita querela," and moved to be inspected; the Court, as a matter discretionary, refused to admit him to bail until he corroborated his allegation by the oaths of witnesses; which he, having done, and the copy of the register where he was born being produced, he was discharged: if he had brought his "audita querela," before he was taken in execution, he must have had a supersedeas of course.(e)

But if an infant bring "audita querela," to reverse a recognizance, and the judges, upon inspection, find him within age, adjudge the recognizance avoided, and discharge the infant; and the conusee afterwards reverses the judgment in the "audita querela," for error; the infant, after his full age, shall have no new "audita querela" to vacate the recognizance, though it once appeared to the judges that he was within age when he entered

(d) Yelv. 155. Cro. Jac. 646. Co. Ent. 87, 88.

(e) Carth. 278. Lloyd v. Eagle, where a judgment has been fraudulently signed against an infant, it seems his remedy is by action of deceit against the attorney, rather than by "audita querela." Cro. Jac. 694.

into the contract ; and the reason is, because the party, in no case, after his full age, can set aside the statute or recognizance.(f)

And if an infant bargain, and sell his lands by deed, indented and enrolled, yet may he, at any time, avoid the bargain and sale, by pleading nonage ; for, notwithstanding the 27 H. 8. c. 16. makes the enrolment in a court of record necessary to complete the conveyance, yet the bargainee claims by the deed at common law, which was, and still is, defeasible by nonage.(g)

Feoffments.

If an infant make a feoffment, he may avoid it by entry, either within age, or at full age ; and if he dies, his heir may enter or have a “*dum fuit infra ætatem.*” The feoffment being a conveyance performed with much greater solemnity than any other, the infant cannot, as in the case of a lease,(h) surrender, grant, &c.(i) have an assize, or bring trespass, before he has avoided the feoffment by entry ;(k) for it is to be presumed, in fa-

(f) 1 And. 25. 228. N. Bendl. 80. pl. 123. Dy. 232. pl. 9. Moor, 75. 460. 2 Aud. 158. 10 Rep. 43. a. Noy. 16. Yelv. 88. 2 Bulstr. 320. F. N. B. 105.

(g) 2 Inst. 673.

(h) 18 E. 4. 2.

(i) Cro. Car. 103. 2 Roll. Abr. 128. Show P. cases, 153. Carth. 436.

(k) Bro. tit. Disseisin, 63. Secus, if the feoffment were made by attorney.

your of such a solemnity, that the assembly of the pais then present, would have prevented it if they had perceived his nonage; and therefore the feoffment shall continue until defeated by entry, which is an act of equal notoriety.

But though the infant may avoid his feoffment by entry, during his nonage, yet he cannot have a "*dum fuit infra ætatem*" till he comes to his full age; for he is allowed to enter, that he may save to himself the profit in the mean time, though such entry, being the act of an infant, seems to be as voidable at full age, as his feoffment: *(l)* but if he were to recover in a writ of "*dum fuit infra ætatem*," the judgment would bind his election, and therefore it can only be brought when he comes of full age. *(m)*

If husband and wife are both within age, and they, by indenture, join in a feoffment, and the husband dies, the wife may enter, or have a "*dum fuit infra ætatem*." *(n)* But if she were of full age, she shall not have a "*dum fuit infra ætatem*" for the nonage of her husband, though they be but one person in law; *(n)* obiter, if she were within, and the husband of full age. *(o)*

(l) And consequently the feoffment still continues capable of confirmation at full age, notwithstanding such entry. 3 Burr. 1794.

(m) F. N. B. 192. Show. P. cases, 153. 3 Burr. 1808.

(n) Co. Litt. 337. F. N. B. 192.

(o) Com. Dig. Enf. c. 4.

If two joint tenants, being within age, make a feoffment, though they may join on an entry or a writ of right, and though the survivor, if one die, may avoid the feoffment, by either of those two methods, yet they cannot join in a "*dum fuit infra ætatem*." (p)

Conveyances in Pais.

3. As to all other conveyances in pais, (except feoffments,) whether in fee, tail, for life, (q) or years, (r) it seems the infant, or his representative, (s) may avoid them by trespass, assize, or entry, within or after age; or by "*dum fuit infra ætatem*," after age, or death within age: (q) and this "*dum fuit infra ætatem*" lies in the *per*, in the *per and cui*, or in the *post*. (t)

A surrender of a copyhold estate (u) may be avoided in like manner.

If the heir, within age, assign to the wife more land in dower than she ought to have,

(p) Co. Lit. 337. F. N. B. 192. *Because*, (says Lord Coke,) the nonage of one, if not the nonage of the other, by which is meant that infant joint tenants cannot have a writ corresponding to the "*dum fuit infra ætatem*," of an ordinary party, because the verb in the writ cannot be changed from singular into plural.

(q) Vide ante, p.

(r) Com. Dig. Enf. C. 4, 5. F. N. B. 192. Cro. Car. 103. 1 Roll. Abr. 730. Shaw. P. cases, 153. Carth. 436.

(s) 18 E. 4. 2.

(t) F. N. B. 192.

(u) Cro. El. 90. 1 Leon. 95. Cro. Car. 103.

he himself shall have a writ of admeasurement of dower, at full age, by the common law; so, if after such assignment, the heir die, his heir shall have such writ to rectify the assignment.(x) And if the heir, within age, before the guardian enters, assigns too much in dower, the guardian shall have a writ of admeasurement of dower, by the statute of W. 3. c. 7. though the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age; because, till then, the interest of the guardian continues.(y)

Deeds in general.

4. Obligations, and deeds in general, may be avoided at any time, by pleading nonage; (z) but it must be specially pleaded, and cannot be given in evidence under the general "non est factum;"(z) because these deeds have an operation from the delivery.(a)

Parol Agreements.

5. Parol agreements, or contracts, may be avoided within or after age, by pleading the general issue, "non assumpsit," and giving infancy in evidence under it.(b) Infancy may

(x) F. N. B. 148. Co. Lit. 39. 2 Inst. 367.

(y) 2 Inst. 367.

(z) Com. Dig. Inf. C. 5. 1 Salk. 279. Ante, chap. 2.

(a) 3 Burr. 1905.

(b) 2 Lev. 144. 1 Salk. 279. See the reason ante, page

also be specially pleaded(*c*) in this action; and payment of money into court will not preclude a defendant from availing himself of nonage, (*d*) because the money may have been paid into court for necessities.

(*c*) 2 Lev. 144. Selw. Ni. Pri. 137.

(*d*) 2 Esp. N. P. C. 481. a.

CHAP. IV.

Of the Confirmation of Voidable Acts.

WHERE the act of an infant is apparently for his advantage, a very slight admission, after he comes of age, will enure as a confirmation of such act; and this, for the plain reason that the privileges attached to infancy being intended as a general protection or shield, shall not operate as a weapon, enabling individuals capriciously to attack the interest of others, or procure to themselves unfair advantages. (a)

Thus, the purchase of an infant being only voidable, vests the freehold in him, until he disagrees thereto; and his continuing in possession after full age, is an actual confirmation of the purchase. (b) (1)

(a) It is precisely on the same principle that a party, having it in his power to plead the Statute of Limitations to a debt, loses that privilege by the slightest acknowledgment of the charge. 1 Salk. 29. 4 East. 599-

(b) Co. Lit. 2. b. 2 Vent. 203.

 AMERICAN CASES.

(1) Where an infant made a mortgage of his lands, and after coming of full age, conveyed the same land subject to the mortgage, this second deed was holden to confirm and make good the mortgage. *Boston Bank v. Chamberlain et al.* 15 Mass. Rep. 220.

So, if he make an exchange of lands, and continue in possession after age, he shall be bound by it.(c)

An infant takes a lease for years, rendering rent which is in arrear for several years, and after age he continues the occupation of the land: this makes the lease good and unavoidable, and by consequence, the lessee chargeable with all the arrears incurred during his minority: for though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority, yet his continuance in possession after full age, ratifies and affirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made.(d)

So, an infant having made a lease for years, and having at full age said to the lessee, "God give you joy of it;" this was holden by Mead a good confirmation of the lease;(e) being a

(c) 2 Vern. 225. Co. Lit. 51. a.

(d) Cro. Jac. 320. Godb. 120. 2 Bulstr. 69. 1 Roll. Abr. 731.

(e) 4 Leon. 4.

AMERICAN CASES.

A deed of conveyance of land being made to an infant, a mortgage of the same being made at the same time by the infant to the grantor, it is an affirmance of the contract if the infant continues in possession after he arrives at full age or if without actual possession he bargains and sells the same land to a stranger. *Hubbard and al. v. Cummings. Vol. 1 Maine Reports, 11 Roberts v. Wiggin, 1. New Hampshire Rep. 73.*

usual compliment to express assent and approbation of what is done.

A mother, as guardian to her children, who were all infants, granted a building lease of a part of their estate for 41 years; her eldest son, about nineteen years of age, joined with her in making the lease, and covenanted that the lessee should have quiet enjoyment, and that the rest of the children, when of age, should confirm the lease: the children all arrived at age, and accepted the rent under this lease, after the youngest came of age: they then brought their ejectment against the lessee, who thereupon filed his bill in the Court of Chancery, to have the lease established, which Lord Hardwicke decreed upon the ground of the acceptance of rent after full age of all the parties.(f)

There is one case, in which an infant having sold a term for years, and received part of the money after he came of age, was allowed notwithstanding to avoid the grant: because the contract was considered absolutely void, and so incapable of ratification.(g) It appears, however, from the current of authorities,(h) that such a contract is only voidable,

(f) *Smith v. Lowe*, 1 Atk. 489.

(g) *Dals.* 64.

(h) Chap. 2. *supra*. If the infant had brought (within or after age) an action of debt against the purchaser, the latter could not have pleaded the vendor's nonage. (18 E. 4. 2. *ante*.) such an action brought after age would clearly have been an affirmation of the sale; which could,

and not void ; if so the only reported ground of the decision is entirely taken away. And it has been ruled in Chancery, that if an infant make an agreement, and receive interest under it, after he comes of age, he shall be bound by it. (i)

(2) If an infant enters into an obligation for payment of money, and being of full age promises to pay, this promise is good, and shall bind him, (k) or his executor, (l) though if he

not therefore have been void, for a void act is as one that never existed, and so quite incapable of confirmation.

(i) 1 Vern. 132.

(k) 3 Leon. 164. Edmond's case,

(l) 4 Leon. 5. Barton's case. The case of Stone v. Withypool, (Cro. Eliz. 127. 1 Leon. 114, 4 Poph. 172. Latch. 31. Owen, 84. 1 Roll. Abr. 18.) was that of an executor sued on a promise to pay the debt of his infant testator, who not having lived to ratify his contract, was in fact never chargeable, and so *no consideration* could exist for the executor's promise. In the case of Morning v. Knop, (Cro. Eliz. 700. 1 Roll. Abr. 18.) the party of full age made no substantive promise to pay a debt contracted in infancy, but only a promise to pay in consideration of *forbearance*. Now as the party, not having made such substantive promise, might have defeated the action against him, by pleading his nonage, *forbearance* could be no con-

AMERICAN CASES.

(2) Smith v. Mayo, and al. Ex'rs. 9 Mass. Rep. 62. Hussey and al. v. Jewett, Ex'rs. id. p. 100.

If a grantee being an infant at the time of the execution of the deed, continue in possession of the land after his arrival at full age, this is an affirmation of the contract. 1 Maine Rep. 11.

had not made such promise he might have avoided the obligation by plea. But when he is unwarily entrapped, immediately on coming of age, into a ratification of his acts while an infant, equity will relieve him from such ratification. (m)

So when the defendant under age borrowed money of the plaintiff, and after full age promised to pay him, this was held a good consideration for the promise, and the defendant chargeable. (n)

And where goods (not necessities) were delivered to an infant, who after age promised to pay for them, this was held a ratification of the contract, and binding on the vendee. (o)

So a promise after age will ratify a bare security for a third person, given by the infant. (p)

sideration for the promise; and the consideration specified having failed, the promise became in consequence void.

(m) 2 Atk. 34. *Brook v. Galley*.

(n) Comb. 381. If he promises after age, to pay when he is able, the plaintiff must prove ability; but ostensible circumstances are sufficient, 3 Esp. 159. and the promise must not be made under duress, or ignorance of the privilege of avoiding the debt, 5 Esp. 102. But as to the latter point, see 12 East, 38.

(o) 2 Str. 690. *Southerton v. Whitlock*, 1 Ld. Raymd. 389. But a repudiation of a new promise after the defendant comes of age must be supported by evidence of an express promise; and payment of part of the plaintiff's demand is not tantamount to evidence of a new promise. 2 Esp. N. P. C. 628. *Thrupp v. Fielder*.

(p) 2 T. R. 766. (Per Ashurst J.) If in an action,

CHAP. V.

Of what an Infant is capable, and What is binding on him.

MISERABLE indeed, says Lord Mansfield, (a) must the condition of minors be ; excluded from the society and commerce of the world ; deprived of necessities, education, employment, and many advantages ; if they could do *no* binding acts. Great inconvenience must arise to *others*, if they were *bound* by no act. The law therefore, at the same time that it protects their imbecility from injury through their own imprudence, enables them to do binding acts for their own benefit ; and without prejudice to themselves, for the benefit of others.

Capable of Offices which do not concern the Administration of Justice, as Park-Keeper, Forester, Gaoler, &c.

It seems, therefore, that an infant is capable of such offices as do not concern the administration of justice, but only require skill and diligence ; and these he may either exercise himself when of the age of discretion, or they may be exercised by deputy, such as

(a) 3 Burr. 1801

the offices of park-keeper, forester, gaoler, &c.(b) The statute of Westminster, 2. c. 11. extends to an infant gaoler, so as to charge him in an action of debt for an escape of one in execution.(c)

Of Granting Copyholds, as Lord of the Manor.

2. If an infant be lord of a manor, he may grant copyholds notwithstanding his nonage ; for these estates do not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor by which they have been demised, and are demisable, time out of mind.(d)

Of being Executor at Seventeen.

3. At the age of seventeen an infant may be an executor ;(e) and if, under the age of seventeen, he be appointed executor, and administration “durante minore ætate” be granted to another, such administration ceased at common law when the infant arrived at the age of seventeen.(f) (By 38 Geo. 3. c. 87. it is continued to twenty-one ;) but before he

(b) Plow. 379. 9 Rep. 48. 97-

(c) 2 Inst. 382. 3 Mod. 222.

(d) 4 Rep. 29. b. 8 Rep. 63. Noy. 41.

(e) 5 Rep. 24. b. Hal. P. C. 17. and in such capacity he may acquit and discharge the debtor for as much as he receives, but he cannot release a debt, for his release might subject him to a “devastavit,” and be prejudicial to others. 5 Rep. 28. Russell’s case.

(f) Hob. 251. Yelve. 128. 5 Rep. 29. Godolph. 102.

attains such age, he cannot assent to a legacy, (g) and even then his assent will not bind him, unless he have assets for debts ;(h) and though he may administer at seventeen, it is said he cannot commit a devastavit till twenty-one.(i)

Of Marrying, under certain restrictions.

4. By the 26 Geo. 2. c. 33. all marriages of infant without banns, or by licence, without consent of parent or guardian, (the infant not being a widow or widower,) are void. But subject to this restriction, the age of consent to a marriage in an infant male is fourteen, (k) and in a female twelve; but they may marry before; and if they agree thereto when they attain those ages, the marriage is good; but they cannot disagree before then; and if one of them be above the age of consent, and the other under such age, the party so above age may as well disagree as the other; for both must be bound, or neither (l)

Though they may marry within the age of consent, yet if the wife hath a child begotten after marriage solemnized *infra annos nobiles*,

(g) 5 Rep. 29. b.

(h) *Chamberlain v. Chamberlain*, 1 Ch. Cas. 257.

(i) *Whitmore v. Weld*, 1 Vern. 328. See post, chap.

8. 99.

(k) But though the parties at twelve and fourteen are capable of contracting marriage; yet by the canons of 1603, it cannot be done without the consent of parents. *Smith v. Smith*, 3 Atk. 307.

(l) Co. Lit. 33. 78, 79. 2 Inst. 434. 3 Inst. 88, 89. 6 Rep. 22. 7 Rep. 43. 1 Roll. Abr. 340, 341.

and is afterwards divorced for such voidable solemnization, the child is a bastard. (m) But the parties are baron and feme, de facto, so that the baron before fourteen, or the wife twelve, may have trespass "de muliere abducta cum bonis viri." (n) If after the age of consent they disagree by parol, and afterwards agree and live together, as man and wife, the disagreement is not binding, but that they may well live together without any new marriage; (o) aliter if the disagreement had been before the ordinary. (o)

And if a man within the age of fourteen takes a wife of full age, and after brings a writ "de muliere abducta cum bonis viri," making continuation of the action after fourteen, this shall be an agreement to the marriage, so that it cannot after be defeated. (p)

But though the party above age may as well disagree as the other, yet he cannot do it before the other arrives at the proper age: (q) also it is said to have been adjudged, (r) that if a man marries a woman within the age of twelve years, and the woman at eleven years of age disagrees to the marriage, and the husband takes another wife and has issue by

(m) 7 Rep. 42. Kenn's case.

(n) 1 Roll. Abr. 340. Moor, 741. 2 And. 208. 6 Rep. 22.

(o) Roll. Abr. 341.

(p) Ibid.

(q) Co. Lit. 79. Lord Decius and Mrs. K. Fitzgerrard, 11 June 29, Car. 2.

(r) 1 Roll. Abr. 341.

her, this issue is bastard ; the first marriage continuing notwithstanding the disagreement of the woman ; for her disagreement, within the age of twelve years is void ; but had the same woman after the age of twelve years married another, the first marriage had been absolutely dissolved, so that the husband might take another wife.(s)

Of doing Homage.

5. One within the age of twenty-one years may do homage, but he cannot do fealty ; because in the doing of fealty he ought to be sworn, which, says Lord Coke, an infant cannot be.(t)

Of taking Oath of Allegiance at Twelve—Of being sworn as a witness at Fourteen.

6. But an infant at twelve might take the oath of allegiance in the town or leet,(u) and at the age of fourteen may be sworn as a witness.(x)

Of choosing a Guardian at Fourteen.

7. At fourteen too he is out of ward of guardian in socage, and may choose a guardian.(y)

(s) Ibid. Babington and Warner.

(t) Co. Lit. 65. b.

(u) Co. Lit. 78. b. Hob. 225,

(x) 2 Hal. P. C. 278. and his tender years will not invalidate the testimony ; for circumstances of distress make as much impression on a young mind as on an old one, Smith v. French, 2 Atk. 245.

(y) Co. Lit. 78. b. post, chap.

*Of disposing of Personal Property by Will :
Male at Fourteen ; Female, Twelve.*

8. An infant may dispose of personal property by will ; but there are many irreconcilable opinions in the books, as to the earliest age at which he may do this ; the learning on the subject is thus summed up by Mr. Hargrave.

Lord Coke states eighteen to be the age,(z) though the reasons or authorities in favour of that time, do not appear ; others mention seventeen, that being the age at which an administration during the minority of an executor, determines ;(a) but this opinion was probably founded on an idea that our spiritual courts make no difference between the time for acting as executor, and the time for making a will ; which is clearly a mistaken notion. However it receives some countenance from the decisive manner in which a late Chancellor of the first authority mentions seventeen, and the ambiguous terms in which he speaks of an earlier age.(b) According to others, fifteen is the age for males, if the party can be proved of sufficient discretion ; but we are not informed why, and therefore little respect is due to this opinion, if that can be deemed one, which was in fact nothing more than a loose dictum.(c) Others doubt whe-

(z) Co. Lit. 89. b.

(a) 1 Vern. 225. 2 Vern. 558.

(b) 1 Ves. 303. 3 Atk. 709.

(c) 2 Vern. 469.

ther any time before twenty-one, is not too early; because none can be administrators till they have attained that age.(d) The reasons usually assigned for not granting administration before twenty-one, are, that an administrator being appointed by statute, his age should be according to the common law, and that the statute of administration requires the security of a bond from the administrator, which an infant cannot give; this latter reason against an infant's being administrator appears the most forcible; but both seem equally inapplicable to the other point; the power of making a will of personal estate, not being derived from, or regulated by any statute, and the giving a bond being foreign to the case of a testator. In Perkins, four is said to be the age for making a will of personalty; but though this is the time mentioned in the old as well as the new editions of his book; yet, as Swinburne observes, it appears to be an error of the press by omission of figure x, and most probably xiii was the age intended.(e) The last opinion on the subject, and that most to be relied on, distinguishes between males and females making the testamentary power to commence in the former at *fourteen*, and in the latter at *twelve*. At these ages the Roman law allowed of testaments; and the civilians agree that our ecclesiastical courts follow the same rule: and to them we ought principally to resort for information on

(d) 1 Vern 326.

(e) Perk. s. 503. Swinb. Test. part. 2. s. 2.

testamentary subjects ; because these being so peculiarly of spiritual conusance they speak more *ex tripode juridico*, than our common lawyers.(f)

But the doctrine is not sustained by the authority of Civilians only. Some respectable common law books mention twelve and fourteen for the same purpose : prohibitions have been refused by the King's Bench, when applied to, to restrain the ecclesiastical courts from allowing wills made at such early ages ; and there are instances in which the doctrine hath been recognized and adopted by the court of Chancery.(g)

To conclude this point, it may be added that, as on the one hand, the rule of the ecclesiastical courts in holding twelve and fourteen to be ages at which males and females, according to the difference of sex, first have the power of making wills of personalty, seems now well established ; so on the other hand, it is in some degree consonant to the doctrine of our common law ; for, though that is silent as to the age for wills of personalty, these being the subjects of a different law, yet it adopts the same standard of twelve and fourteen for other purposes, and so far deems them the ages of discretion, as to give infants of those ages the power of choosing

(f) Swinb. on Test. part 2. s. 2.

(g) Off. of Ex. c. 18. Shep. Touch. 403. T. Jon. 210. 2 Show. 204. Comb. 50. Prec. in Ch. 316. Gilb. Eq. Rep. 74.

guardians, and to presume that they are doli capaces, in respect to crimes.(h)

Of disposing by Will of the Custody of his infant Child.

9. Though a person under the age of twenty one cannot dispose of his lands, yet it is said that he may, pursuant to the statute of 12 Car. 2. c. 24. dispose of the custody of his infant child, and that such disposition draws after it the land, as incident to the custody.(i)

Of declaring, sub modo, the Uses of a Fine.

10. If an infant levies a fine, he is enabled to declare the uses thereof, and if he reverses not the fine, during his nonage, the declaration of uses will stand good for ever; for though that be a pais, and all such acts an infant may avoid at any time, after his full age, if he do not consent; yet, being made in pursuance of the fine levied, which fine must stand good forever, (unless reversed in the manner which has been mentioned,) so will the declaration of the uses too.(k) But an infant's sealing advantageous marriage articles, jointly with his father, is not sufficient to declare the uses of a fine and recovery which he suffered after age, jointly with his father.(l)

(h) 1 Hal. P. C. 22.

(i) Vaugh. 178.

(k) 2 Rep. 58. a. 10 Rep. 42. Moor, 22. Dals. 47. Leon. 159. Gouls. 13. Jon. 390. Winch. 103, 4.

(l) 3 P. Wm's. 206. Nightingale v. Ferrers. Vide Hales v. Risley, 3 Keb. 326. 759. 818.

Of accepting Jointure to bar Dower.

11. It is now settled that a female infant may bar her dower by consenting to a jointure in lieu thereof, agreeably to 27 H. 8. c. 10.(m) But it seems absolutely necessary, to support such a settlement, that it be made before marriage.(n)

Whether or no equity will compel the performance of an agreement entered into by a female infant with respect to her real estate, in consideration of marriage, must depend on the competency of the settlement made on her, and the leaving of issue.(o)

Of executing a simply Collateral Power.

12. In one case, an infant having covenanted to settle his estate on marriage, according to a power vested in him, but having died before full age, the remainder man was compelled to perform the covenant (p) But in a

(m) *Earl of Buckinghamshire v. Drury*, 5 Br. P. C. 570. 4 Br. Ch. Ca. 500. *Caruther's v. Caruther's*, 5 Ves. 717.(n) 1 Fonbl. Tr. Eq. 74.

(n) *Lucy v. Moore*, 3 Br. P. C. 514. *Seymour v. Bingham*, 3 Atk. 56.

(o) 2 P. Wms. 243. *Cannel v. Buckle*, 3 Atk. 612. *Harvey v. Ashley*, 1 Br. Ch. Rep. 106. *Dunford v. Lane*, Id. 152. *Williams v. Williams*. Such an agreement or covenant, (until confirmed at full age,) is no severance of a joint tenancy. *May v. Hook*. Bac. Abr. Infancy, l. 3. Co. Lit. 13th edit. 246. note 1.

(p) *Hollingshead v. Hollingshead*, Gilb. Eq. Rep. 137.

later case, Lord Hardwicke declared, in broad terms, that a power, coupled with an interest over real estate, could not be exercised by an infant (*q*)

Of Agreeing to a Settlement made by Betrothed adult.

13. However he may consent to a settlement made by his wife, of her own land ; as where a male infant married an adult, who, by settlement on the marriage, covenanted that her estate should be settled to certain uses, he was bound by her covenant. (*r*)

(By Custom) of Selling Land, or Leasing it, at Fifteen.

14. By the custom of Gavelkind, an infant of fifteen is reckoned capable of selling his lands ; (*s*) and in some places an infant by custom may, at fifteen, make a lease which shall bind him after he comes of age. (*t*)

cited in 2 P. Wm's 229. and 1 Str. 604. But it has been called an idle case, and not law. Sugden on Powers, 137. 1st edit.

(*q*) 3 Atk. 696. Hearle v. Greenbank. But he may execute a simply collateral power, where he is a mere instrument only, S. C. 710, 711. and has not, nor ever had or can have, any interest.

(*r*) Slocombe v. Glubb, 2 Br. Ch. Rep. 545.

(*s*) Lamb. 624, 5. but shall have his age, and all other privileges at common law, 1 Roll. Abr. 144.

(*t*) Co. Lit. 45. a.

Of suffering a Recovery by Guardian, with Permission of the Court, and conveying as Trustee under an order of Chancery.

15. In cases of necessity, the Court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as vouchee. But this is seldom allowed by the Court, unless it be upon emergencies when it tends to the improvement of the infant's affairs; as, when lands of equal value have been settled on him, and when he has had the King's privy seal for that purpose. These recoveries have been allowed and supported by the judges, and the infant could not set them aside or shake them: besides, if such recoveries be to the prejudice of the infant he has his remedy for it against his guardian, and may reimburse himself out of his pocket to whom the law had committed the care of him,(u)

(u) Bac. Abr. Infancy, 1. 2. The king, upon petition may admit an infant to suffer a valid recovery by guardian. (Com. Dig. Enf. B. 2. 1 Vern. 461, Ley. 83. 1 Salk. 567.) And if an infant come in as vouchee by guardian, he shall be bound by it. (Cro. Car. 307. Hob. 197. 1 Roll. Abr. 731. 751, 752. Jones, 318. Godb. 161. 1 Leon. 211. 1 Sid. 321. Cro. El. 471, 2. Contra, 10 Rep. 43. a.) When an infant is permitted to suffer a recovery with double voucher, he must make a tenant to the præcipe by feoffment, and give livery of seisin in person, or by fine; (Fig. 65.) because these conveyances are only voidable; 2 Wm's Saund. 96. a.) However, if it be established that an infant's deeds are also only voidable, he need not be confined to these two modes of making tenant to præcipe.

It has been a common practice for infants, having obtained a privy seal for that purpose, to suffer common recoveries; and the law has been so settled ever since Blunt's case, reported in Hobart, 196 (x) Though it seems they cannot obtain the king's special direction to levy a fine (y) But common recoveries suffered by privy seal, are now disused, and private acts of parliament substituted for them. (z)

By 7 Ann. c. 19 it is enacted, that it shall and may be lawful for any person under the age of twenty-one years, by the direction of the high court of chancery, or the court of Exchequer, signified by an order made upon hearing all parties concerned, on the petition of the person or persons for whom such infant or infants shall be seized or possessed in trust, or of the mortgagor or mortgagors, or guardian or guardians of such infant or infants, or person or persons entitled to the monies secured by or upon any lands, tenements, hereditaments, whereof any infant or infants, are or shall be seized or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey(a)

(x) Hargrave's Co. Lit. 380. b. note 1.

(y) 1 Vern. 461. Sir Humphrey Mackworth's case.

(z) 2 Wm's Saund. 96. a.

(a) The conveyance must be settled by a master, before the order is given, (Pr. in Ch. 284.) and the court will not order an infant trustee to convey, unless a declaration of his trust appear in writing. (2 P. W. 549. Ex parte Vernon.) But he may convey by common recover-

and assure any such lands(*b*) tenements, or hereditaments, in such manner, as the said Court of Chancery, or Court of Exchequer, shall, by such order so to be obtained, direct to any other person or persons; and such conveyance or assurance so to be had or made as aforesaid, shall be as good and effectual in law to all intents and purposes whatsoever, as if the said infant or infants were, at the time of making such conveyance or assurance, of the full age of twenty-one years.

And it is further enacted by the said statute, that all and every such infant and infants, being only trustees, mortgagee(*c*) or mortgagees, as aforesaid, shall and may be compel-

ry, 3 Atk. 550. 8. *Ex parte Johnson*; and if the infant trustee be a feme covert the court may direct her to convey by fine, 3 Atk. 479. *Ex parte Maire*, where the trust does not appear in writing, *Cestui que trust* will be left to get a decree by bill, (2 P. W. 549.) and if the infant is more than a bare trustee, he is not within the statute. As where A. devised his lands to an infant in fee, charged with all his debts and legacies on a bill being filed, the Court directed the master to take an account of the debts and legacies, and of the personal estate, and to report the deficiency of the latter. The infant to convey when of age, unless cause shewn within six months after. (3 P. W. 389. n.) But the heir is allowed no day to shew cause, when the devise is to trustees to pay debts. 1 Atk. 420. *Blatch v. Wilder*.

(*b*) As to the transfers at the bank, see 36 Geo. 3. c. 90.

(*c*) In 4 Ves. 147. *Ex parte Sergison*, the Lord Chancellor thought the legal estate in mortgaged premises, passed under a residuary devise of the mortgage to A. (who was also executor,) his heirs and assigns; then A. being

and satin suits, laced with gold, held not necessary. (n)

If an infant promises another, that if he will find him meat, drink, and washing, and pay for his schooling, he will pay 7*l.* yearly ; an action on the case lies upon this promise : for learning is as necessary as other things ; and though it is not mentioned what learning this was, yet it shall be intended what was fit for him till it be shewn to the contrary on the other part : and though he to whom the promise is made do not instruct the infant, but pays another for it, the promise of repayment thereof is good (o)

Assumpsit for labour and medicines in curing the defendant of a distemper, &c. ; nonage pleaded by defendant : plaintiff replied, necessities generally. And upon a demurrer to this replication, it was objected, that the plaintiff had not assigned in certain, how or in what manner the medicines were necessary ;

(n) Cro. El. 583. Nor cockades found for his soldiers by an officer, 8 T. R. 578. *Hands v. Slaney*. The question of necessities is to be governed by the real, not the ostensible circumstances, of the infant, Peake, 229, 1 Esp. 211. Regimentals sold to a volunteer ; necessities : 5 Esp. 152. So, money advanced to release him from custody in *execution*, 5 Esp. 28. If he was in custody on *mesne* process, it must be shewn that he was arrested for necessities (Ibid.) 13 East. 6. But where the action is for money lent to save the infant from an arrest in Scotland, the infant must shew that his infancy would have been a defence to the arrest in that country. 3 Esp. 163.

(o) 1 Roll. Abr. 729. Palm. 529.

but it was adjudged that the replication in this general form was good. (p)

Even by Bond.

18. By the current of authorities, it seems that an infant may enter into a single bill for the payment of necessities, and that an action of debt will lie on such obligation ; (q) all the cases which lay it down that a bond with a *penalty*, entered into for such payment, is void, were decided before the 4 Ann. c. 16. s. 13. Since that act, it may be thought the penalty can make no difference. (r)

So, an infant may bind himself in an *assumpsit* for the payment of necessities ; and an action on the case lies against him upon the promise for this, but in nature of an action of debt ; and therefore, where debt lies, an action on the case lies against him. (s)

However, there are two respectable authorities, (t) which lay it down that an infant can-

(p) Carth. 110. *Huggins v. Wiseman*.

(q) 1 Lev. 86. *Russel and Lee*. 1 Keb. 382. 416. 423. Co. Lit. 172. Cro. Eliz, 910. 1 Roll. Abr. 729.

(r) But see 8 East. 331.

(s) 1 Roll. Abr. 729. Noy. 85. Latit. 157. 3 Buls. 188. 1 Roll. Rep. 328. He may bind himself in a promissory note for necessities, and instruction in a business. 8 T. R. 578.

(t) Cases in Law and Eq. 185. Godb. 219. *Rearsby and Cuffer's case* ; and it was held at *Nisi Prius*, that he was not liable on a bill of exchange, accepted for necessities. 1 Camb. 553. *Williamson v. Watts*. Mansfield, G. J.

not, either by a parol contract or a deed, bind himself, even for necessities, *in a sum certain*; that should an infant promise to give an unreasonable price for necessities, *that* would not bind him; and that therefore it may be said that the written or parol contract, does not bind him; but only since an infant must live as well as a man, the law gives a reasonable price to those who furnish him with necessities.

There is a singular case in Keble, which has decided, that though an infant cannot for sixpence in hand paid, license another to take two ounces of her hair, yet she may validly agree with the barber to be trimmed.^(u)

Of binding himself Apprentice in London. at Fourteen.

19. By the custom of London, an infant unmarried, and above the age of fourteen, though under twenty-one, may bind himself apprentice to a freeman of London,^(x) by indenture, with proper covenants, by the custom of London, shall be as binding as if he were of full age; and for breach thereof an action may be brought in any other court as well as in the courts in the city.^(y) But this custom does not extend to one bound apprentice under twenty-one, to a waterman; for the company of watermen are but a voluntary

^(u) 3 Keb. 369. *Anna Secrogham v. Stuartson.*

^(x) Moor, 135. 2 Bulstr. 192. 2 Roll. Rep. 805. Palm. 361. 1 Mod. 271.

^(y) Moor. 136.

society, and being free of that does not make one free of the city of London.(z)

By the 4 Geo. 1. c. 11. s. 5. infants of fifteen may, in the manner therein specified, bind themselves by a contract to serve in the plantations.

Of presenting to a Church——Qualifying Chaplains.

20. An infant may present to a church; and it is said, that this must be done by himself, of whatsoever age he be, and cannot be done by his guardian; for the guardian can make no advantage thereof, and consequently has nothing therein whereof he can give an account, and therefore the infant himself shall present (a)

But it is elsewhere said, that if the heir be within the age of discretion, the guardian may present in his name.(b) However the law seems now settled in the full extent of Lord Coke's opinion, by a determination of Lord Chancellor King. On the principle that an infant of any age may present, his Lordship confirmed an appointment by an infant heir, though it appeared that the child was not a year old, and that the guardian guided the child's pen in making his mark, and putting his seal.(c)

(z) 6 Mod. 69.

(a) Co. Lit. 89. a. 29 E. 3. 5. 3 Inst. 156.

(b) Cro. Jac. 99. Parson's law, c. 20. fol. 76.

(c) 2 Eq. Cas. Abr. Infant, B. pl. 3. 3 Atk. 710.

Though this decision may remove all doubts about the *legal* right of an infant of the most tender age to present, still it remains to be seen, whether want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from an infant, without concurrence of guardian.—Although a duke, earl, or the like, be but a minor, not above ten years of age, in the custody and in the family of another nobleman, who may and doth retain chaplains; yet he may qualify chaplains to be dispensed withal to hold two benefices with cure, in like sort as if of full age.(d)

Partition by Writ binding.

21. Partition by writ “*de partitione facienda*” is binding on infants, because by judgment in a court of justice to which no partiality can be imputed.(e)

Where not.

22. But if there be two coparceners, one of them an infant, and they make an unequal partition, this shall not bind the minor: (f) for though partition, if equal, will bind an

(d) 4 Rep. 119.

(e) Co. Lit. 171. b. This partition is therefore binding, though unequal, *ibid.*; but an unequal partition in Chancery not, *ibid.*

(f) Lit. 1, 258. Co. Lit. 171. But it is only voidable, and may be confirmed at full age, if the party so chooses. Co. Lit. 171. Taking the whole profits after age, is a confirmation, Lit. Sect. 258.

infant, because compellable to make partition and whatever one is compellable to do, he may also do voluntarily ;(g) yet when the partition is unequal, and the less part allotted to the minor, this shall not bind her ; for then the security the law has provided for infants, to prevent them from being over-reached, would be useless. And upon a *bill* for partition between an adult and an infant, as the latter cannot convey till he comes of age, the court will therefore respite the conveyances on the part of the adult, and this, it seems, whether the infant be plaintiff or defendant.(h)

Decree in equity for his Benefit.

23. A decree in equity for the benefit of an infant, will bind him ; nor shall his executor dispute such decree, though it may be for his advantage to do so.(i)

Award made with consent of Guardians.

24. If an infant submit to arbitration, he may execute or avoid the award at his election, as he may all other his contracts,(k) but an infant was held bound by an award made

(g) 3 Burr. 1801.

(h) Lord Broke v. Lady Hertford, 2 P. Wms. 518. Tuckfield v. Buller. Ambl. 197.

(i) 1 Atk. 631. Also by a decree in a cause where he is plaintiff, 3 Atk. 626. Gregory v. Molesworth.

(k) 13 Hen. 4. 12. 10 H. 6. 14. March 111. 141. 1 Roll. Abr. 730. 1 Lev. 17.

upon a reference, with the consent of his guardian. *(l)*

Indeed, wherever an infant, with the advice of his friends, enters into a contract beneficial to his interests, equity will support it. Therefore, where A. mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate : and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest were made principal ; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant, who was then near of age, signed it ; and the account was admitted to be fair : the Lord Chancellor held, that though regularly interest should not carry interest, yet that in some cases it would be injustice if interest were not made principal ; and the rather in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence. *(m)*

(l) Bishop of Bath and Wells *v.* Hipposley, cited in 3 Atk. 614. An infant shall be bound by the offer made by his answer in Chancery, if the other side be thereby delayed, and if he does not immediately, on coming of age, apply to the court to retract his offer, and amend his answer, 2 Vern. 724. Cecil *v.* Salisbury.

(m) Earl of Chesterfield *v.* Lady Cromwell, 1 Eq. Ca. Abr. 287.

What binding Generally.

25. Generally, whatsoever an infant is *bound to do by law*, the same shall bind him, albeit he doth it *without* suit of law.⁽ⁿ⁾ And also such acts of an infant as *do not touch his interest*, but take effect from an *authority* which he is *trusted* to exercise, are binding. As where an infant-patron presents, an infant executor duly receives and acquits, passes and administers the assets; an infant, head of a corporation, joins corporate acts; an infant officer does the duty of an office which he may hold.^(o)

It was laid down by Lord Mansfield,^(p) as a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him. And this rule has been adopted in subsequent cases.^(q)

Conditions attached to estate or Gift.

26. An infant is bound by all conditions, charges and penalties, in an original conveyance, whether he comes to the estate by grant

(n) Co. Litt. 172. a. The Court of Chancery will decree building leases of 60 years, of infants' estates, when it appears to be for their benefit; and such leases are binding on them, 2 Vern. 224. Agreements before marriage on behalf of infants by parents and guardians are binding on infants. 9 Vers. 19. Ainslie v. Medicott.

(o) 3 Burr. 1802.

(p) Drury v. Drury, 5 Bro. P. C. 570.

(q) 2 T. R. 161. Madden v. White.

or descent.(*r*) So by conditions annexed to the estate, at common law, because, “transit cum onere ;” and therefore if the infant will have the estate, he must observe the condition upon which it was granted.(*s*)

Therefore, if a person devise to his granddaughter, who is not heir at-law, lands, upon condition that she marry with the consent of certain trustees, she is obliged to take notice at her peril of the condition, and likewise to perform it ; but had she been heir at-law, she must have had notice given her of the condition, to make the marriage without consent, a forfeiture.(*t*)

Where A. gave lottery tickets among her servants, on condition, that if any of them came up a prize of 20*l.* or more, they should give one half to her daughter, and the ticket given to the foot boy, who was an infant, came up a 1000*l.* prize ; it was holden in Chancery, that the daughter was well entitled to a moiety ; for a gift to an infant, on condition, binds him as well as another person (*u*)

In Whittingham’s case, 8 Rep. 44. diversities are taken by Lord Coke, between conditions in *fact* that are expressed, (as to pay money or to do or abstain from any particular act,) and conditions in *law*, that are implied, and distinguishable as conditions by the com-

(*r*) Co. Litt. 246. b. 380. b. 8 Rep. 44.

(*s*) Carth. 43.

(*t*) Vent. 200. 2 Lev. 22. 1 Mod. 86. 300. Fry and Porter, 2 Vern. 343.

(*u*) 2 Vern. 560. Scott v. Houghton.

mon law and by statute : Conditions by the common law, he observes, are two-fold ; those founded on skill, and those not so founded : Conditions by statute are also of two qualities ; when the statute gives recovery in law for execution of the condition, and when it gives an entry, and no recovery. If the condition in law, founded on skill and confidence, (as that attached to a stewardship) be broken, the infant is barred for ever : not so, where the condition is not founded on skill and confidence ; as where infant, or feme covert, lessee for life, makes a feoffment on fee, and the lessor enters for the forfeiture ; yet it shall not bar the infant, or feme, after the death of her husband.

For the condition in law by statute, if an infant or feme covert commit waste, it shall bind the infant and feme covert ; for the statute gives the action to recover the land. But where the statute gives an entry, and no action, as in case of an alienation in mortmain, the infant, or feme, is not barred by entry for condition broken.(x)

(x) See also Co. Litt. 233. b.

CHAP. VI.

How far the Law protects an Infant, by suffering no Advantage to be taken of his Laches.

THE entry of an infant is not taken away by descent cast, by reason of his weakness and incapacity to claim, which is not to be imputed to him.(a) But if B. tenant in tail, enfeoffs A. in fee, who hath issue within age and dies, B. abates and dies seised, the issue of A. being still within age, this descent shall bind the infant ; because the issue in tail is remitted to his former and elder right, which is to be preferred before the defeasible title of the discontinuee's heir.(b)

It being a rule in law too, that the possession and being seised of a bastard eigne bars the mulier ; so, if the mulier be an infant during the possession of the bastard eigne, yet he is barred by the descent : (c) for though generally no laches can be imputed to an infant, because not being of the age of consent, his permission cannot be taken for a consent ; yet the law has not thought fit in this case to except the infant from the imputation of laches,

(a) Lit. s. 402, 403.

(b) Co. Lit. 246. a.

(c) Co. Lit. 244. 8 Rep. 101. Sir R. Pexall's case, Plow. 372.

because such exception might happen to be a public mischief in a very tender point; for it might be any man's case to suffer by the bastardy of an ancestor; and it is difficult to revive the evidence of legitimation, which so easily perishes with the life of the party.

If a man make a feoffment in fee to another, reserving rent, and if he pay not the rent within a month, that he shall double the rent; and the feoffee die, his heir within age, and the infant pay not the rent; he shall not by his laches herein forfeit any thing; because he is provided for by the statute, *(d)* "non current usuræ contra aliquem infra ætatem existent:" but it doth not extend to a condition of re-entry for non-payment of rent. This the infant is subject to if he omit the payment, for the re-entry cannot be called "usura," *(e)* And generally, the laches of an infant in not performing a condition annexed to an estate made either to his ancestor or himself, shall bar him of the right of the land for ever. *(e)*

By the 9th Geo. 1. c. 29. s. 5. *(f)* it is enacted, that no infant or feme covert shall forfeit any copyhold messuages, &c. for their neglect or refusal to come to any court or

(d) Stat. of Merton, c. 5.

(e) Co. Lit. 246. b. 380. b. Neither does the provision of the statute extend to femes covert. *Ibid.*

(f) It had been doubted before. Carth. 41. Salk. 386. pl. 1. Comb. 118. 3 Mod. 221. Show. 84. Lutw. 765.

courts to be kept for any manor whereof such messuages, &c. are parcel, and to be admitted thereto; nor for the omission or denial to pay any fine or fines imposed or set upon their or any of their admittances to any such copyhold messuages, &c.

And by the common law, infants are not bound for want of claim and entry within a year and a day; nor are they bound by a fine and five years non-claim, nor by the statutes of limitation, provided they prosecute their right within the time allowed after the impediment removed. (g) Nor are they bound by a "cessavit per biennium," because the law intends that they do not know what arrearages to tender. (h)

(g) Plow. 358. 2 Saund. 121. But if the five years begin to run in the time of the ancestor, and he die before they are expired, having made no claim, the heir, though an infant, will be barred if he claim not within the five years. Plow. 358. And where an infant, not being party to a fine, and having a present right, dies during his infancy, his heir must enter within five years after such death, (1 Leon 215. Cotton's case) and not at any time after; as is laid down in Lord Coke's report of the same case in 2 Inst. 519. See 2 H. Bl. 584. Dillon v. Leman. The exemption of infants from the effect of the statutes of limitations extends to actions of trover, (Cro. Car. 245. Swayn v. Stephens) and trespass on the case. 2 Saund. 120. Chandler v. Vilett.

(h) 3 Mod. 223. But they shall have their age in this case, only when in by descent; and even as to that, some books are contrary. Co. Lit. 390, b. post, chap. 8. The

If lands are devised to trustees until debts paid, and then to an infant and his heirs, and a stranger enters on the land, levies a fine, and five years and non-claim pass, and the infant when of age brings an ejectment, but is barred because the trustees ought to have entered; yet equity will relieve, and not suffer an infant to be barred by the laches of his trustees, nor to be barred of a trust estate during his infancy; and the infant in this case shall recover the mesne profits (i)

So, if a stranger enters and receives the profits of an infant's estate, he shall in consideration of equity be looked on as a trustee for the infant (k) And if a man receive the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him, he shall account for the profit throughout, and not during the infancy only. (l)

But it has been ruled in Chancery, that where one receives the profits of an infant's estate, and six years after his coming of age, he brings a bill for an account, that the stat-

writ was only applicable where the tenure was in fee, and has now given place to speedier remedies. Hargrave's Co. Lit. 142. note 2.

(i) 2 Vern. 368. *Allen v. Sayer*. But a fine and five years nonclaim will bar an infant cestui que trust, in favour of a purchaser. 3 P. Wms. 310. n. *Lord v. Lady Huntingdon*, 309. *Wych v. East India Company*.

(k) 1 Vern. 295. 2 Vern. 342.

(l) Eq. Cas. Abr. 280. *Gallop v. Holworthy*.

ute of limitations is a bar to such suit, as it would be to an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust as, being a creature of a court of equity, the statute shall be no bar to; for he might have had his action of account at law, and therefore no necessity to come into this court. The reason why such bills are brought in equity is, that the plaintiff may have the discovery of books, papers, and the party's oath, which they cannot so well do at law. But if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in equity; and there is no sort of difference in reason between the two cases. (*m*)

If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death; a year being allowed by the statute of distribution is compellable. But if the legatee be of age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable but on demand, and he shall not have interest but from the time of his demand; otherwise it is in the case of an infant, because no laches is imputed to him. (*n*)

(*m*) Prec. Chan. 518. Lockey and Lockey.

(*n*) 2 Salk. 416.

But if an infant present not to a church, within six months, the church shall lapse—if the five years for making a claim after a fine begin in the ancestor's life, the infant must claim within them; and he shall be barred in an appeal of the death of his ancestor, if he do not bring it within a year and a day. If the king die seised the infant is driven to his petition; for in these cases the law prefers the good of the church, the repose of the realm, life, and the king's prerogative, before the privilege of infancy.(o)

(o) Co. Lit. 246.

CHAP. VII.

Of Infants en Ventre sa Mère.

THE civil law, for the benefit of the infant, reputes a child in his mother's womb in the same condition as if born; and therefore a child en ventre sa mère, may be appointed executor, or may take a legacy. If there be two or more at the birth, they shall be joint executors, or joint legatees of the thing bequeathed.(a)

And by our law, a child en ventre sa mère may be vouched; is capable of taking; the mother may detain charters on its behalf; a bill may be brought on its behalf; a court of equity will grant an injunction in its favour to stay waste;(b) and the destruction of such a child is murder (c)

All the books have admitted that a devise to an infant when he shall be born is good as an executory devise, and that the freehold shall descend to the heir in the mean time;(d) and whatever doubts may formerly have been entertained on the subject, it is at this

(a) Godolph. Orph. Leg. 102.

(b) 2 Vern. 710.

(c) 3 Inst. 50. 1 Ves. 86.

(d) 1 Lev. 135. Raym. 163. Snow v. Cutler, 1 Sid. 153.

day clearly agreed, that a devise to an infant en ventre sa mère is good, though he be born after the testator's death; and he shall take by way of executory devise (e)

So it is clear, that if land be devised for life, the remainder to a posthumous child that this is a good contingent remainder; because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or eo instanti that it determines, it is sufficient (f)

But it was formerly held, that a man could not surrender copyhold lands immediately to the use of an infant en ventre sa mere, though he might by way of remainder; for a surrender is a thing executory, and nothing vests before admittance; and therefore if there were a person to take at the time of admittance, it was sufficient; and not like a grant at common law, which, putting the estate out of the grantor, must be void if there be nobody to take. (g)

(e) 1 Freem. 244. 293. Fearn, 3d Ed. 429. 7 T. R. 100. But where A. devises the surplus of his estate to his children and grandchildren, a grandchild en ventre sa mere at testator's death, shall not take. *Secus*, had it been the children and grandchildren, living at his death, 1 P. Wms. 342. Northey v. Strange, Pr. in Ch. 470. Gilb. Eq. Rep. 136. 1 P. Wms. 246. Beale v. Beale, 2 Bro. Ch. Ca. 320. Clarke v. Blake.

(f) Salk. 228. Carth. 309. Fearn, *passim*.

(g) 2 Bulst. 273. Moor, 637.

A posthumous child is within a provision in marriage articles for such children of the marriage as should be living at the death of the father or mother, and shall take under the statute of distributions (*h*)

If there be, a bastard eigne and mulier puisne, and the bastard enter and die seised, his issue shall inherit the land, and exclude the mulier for ever; but in this case, if the bastard had died leaving issue en ventre sa mere, and the mulier had entered and then a son were born, yet cannot he enter upon the mulier; for the law requires an immediate descent, which cannot be before the person is in esse. (*i*)

And if a man seised of land in fee die, his wife privement ensient with a son, and a stranger abate and die seised, and after the son is born; his entry is tolled by the descent; because at the time of the descent he had no right to enter, not being in esse, and by consequence had no wrong then done him; and the lord had none but the heir to avow upon at the time of the descent. (*k*)

(*h*) 1 Ves. 85. *Millar v. Turner*. *Burnet v. Maun*, 1 Ves. 156. So, within a devise to "all and every the children of J. C. at twenty-one." 1 Br. Ch. Ca. 530. *Congreve v. Congreve*. But see 3 Br. Ch. Ca. 352. *Hughes v. Hughes*. A bastard en ventre sa mere, cannot take under a bequest to all the natural children of J. L. for a bastard's reputation begins with its birth. 1 P. Wms. 529. *Metham v. Duke of Devonshire*.

(*i*) Co. Litt. 244. See ante, 83.

(*k*) Co. Litt, 245. b.

If an usurpation be had on one en ventre sa mere, at the next turn after his birth, he shall be relieved on the statute Westm. 2d. c. 5.

CHAP. VIII.

*For what an Infant is liable.—I. Civilly
2. Criminally.*

In execution of Offices.

1. **I**T seems to follow as the result of entrusting an infant with certain offices, that he should be liable to the consequences of his acts in the exercise of those offices; otherwise the appointment were but nugatory. Thus, the statute of Westminster^(a) extends to an infant gaoler, so as to charge him in an action of debt for the escape of one in execution.^(b) And if an office in a parkship be given or descend to an infant, if the condition in law annexed to such an office (which is skill) be not observed, the office is forfeited.^(c)

But though an infant may administer at seventeen, he cannot commit a “devastavit,” till twenty one.^(d) However he is liable to be punished for doing or suffering waste as

(a) West. 2. c. 11.

(b) 2 Inst. 382. 3 Mod. 322.

(c) 3 Mod. 224.

(d) 1 Vern. 328. per Lord King in Whitmore v. Weld, the office of executor being in autre droit, is not exactly analogous to those before mentioned; and the acts which would cause a devastavit, being voidable, the waste can

tenant by curtesy, for life or years ;(e) and when in by purchase he is liable to a "cessavit;"(f) also to the repair of bridges, high roads, &c. when his lands are held by such tenure.(g)

Contracts.

1. A. It follows from an infant's being allowed to contract for necessities,(h) that having contracted, he is liable to be sued for them ; he is also liable for necessities furnished to his wife or children ; but if they were provided *in order* for the marriage, he is not chargeable, even though his wife use them.(i) If he accept a lease rendering rent, though he may wave the term and not enter, yet if he enter the land, he shall be charged with an action of debt during his minority.(k)

never arise—as a release of debts by infant executor, which could not be pleaded by the debtor, and so no "devastavit." 5 Rep. 28.

(e) Co. Lit. 380. b. 2 Inst. 328. 303. Com. Dig. Enf. D. 3. Plowden, 355. Stowel's case.

(f) Co. Lit. 380. b. See ante, 89.

(g) 2 Inst. 703.

(h) Ante, 72. He is in no case liable for *interest* secured on a bond, whatever might have been the consideration of the bond. 8 East R. 330. Nor is he liable on the custom of merchants for his bill of exchange, Carth. 160.

(i) 1 Str. 168. And though it is otherwise at law, yet in equity he is liable to repay *money borrowed* by him, if actually expended on necessities, or in discharging debts contracted for them. 1 P. Wms. 559. Marlow v. Pitfield ante, p. 19.

(k) 2 Bulstr. 69.

(1) If an infant comes to a stranger, who instructs him in learning, and board him, there is an implied contract in law, that the party shall be paid as much as the board and schooling are worth (*l*). But it has of late years been often determined, that where a parent or relation, &c. places an infant at a boarding school, the credit being given to such parent, relation, &c. the master cannot have any remedy against the infant (*m*). And an infant who lives with, and is properly maintained by, his parents, cannot bind himself to a stranger for what might otherwise be allowed as necessaries. (*n*)

An infant was held liable for a fine on his admission to a copyhold estate (*o*). But not bound by his contract to keep his own houses in repair. (*p*)

Torts.

1. B. Infants are liable for torts and injuries of a private nature ; as disseisins, trespass, (*q*) slander, (*r*) assault, (*s*) &c. But though an infant may be fined for a disseisin, yet he can-

(1) *Baker v. Lovett*, 6 Mass. R. 79.

(*l*) *Allen*, 94. *Dunscomb v. Tickridge*.

(*m*) *Bac. Abr. Infancy*, I. 1. Vol. 3. 595.

(*n*) 2 Bl. Rep. 1325.

(*o*) 3 Burr. 1717.

(*p*) 2 Rol. R. 271.

(*q*) 2 Inst. 328.

(*r*) *Noy*. 129.

(*s*) 1 T. R. 336.

not be imprisoned^(t) for it, so much being allowed to the indiscretion incident to his infancy.^(u)

An infant is also liable in detinue for goods delivered to him for a purpose which he has failed to perform, and which goods he refuses to return ^(x) But a plaintiff cannot in general, by changing his form of action from contract to tort, charge an infant for a breach of contract; as by suing in "case" for the negligent or immoderate use of a horse:^(y) or by bringing "trover" for goods delivered on a contract ^(z) Nor can he be a trespasser by

(t) Nor for failing at the day, after vouching a record in assise. Hal. Hist. P. C. 20.

(u) 1 Hawk. P. C. c. 64. s. 35. and his barely commanding or assenting to a disseisin, does not constitute him a disseisor; but only actual entry by himself, not being carried in by another. (1 Roll. Abr. 631.) But accepting a release from a co-infant-jointtenant, and entering, is a disseisin; for the release is not binding. (Bro. Disseisin, 19.

(x) 1 New. Rep. 140. 1 Roll. Abr. 530. *Furnes v. Smith*, which was an action in the Admiralty Court, in the nature of trover, for converting goods, contracted to be conveyed over sea.

(y) 8 T. R. 335.

(z) 1 Lev. 169. 1 Keb. 905. 913. 1 Sid. 229. In *Bristow v. Eastman*, 1 Esp. N. P. C. 172. Lord Kenyon was of opinion, that an action for money had and received would lie against an infant for money he had embezzled; for the action, though in form "ex contractu" was in substance an action "ex delicto;" and as the infant cannot be prejudiced in cases of contract, by the form of

prior or subsequent assent, but only by his own act.(a) But if, without any contract, he seizes goods, trover lies against him.(b) So if he take them under pretence of being of full age.(c)

If an infant affirming himself to be of age, borrows 100*l.* and gives his bond for it, and being sued upon the bond, avoid it by reason of nonage, yet no action, it seems, lies against him for the deceit.(d) So where an action of deceit was brought for affirming upon the sale of a horse, that it was the defendant's whereas it was the horse of another man; the defendant pleaded infancy; and on demurrer it was adjudged for the defendant; for the action depended on the contract, and by pleading infancy the defendant elected to

the action; so in cases *ex delicto*, he cannot derive any advantage from it.

(a) Co. Lit. 180. b. n. 4.

(b) 3 Bac. Abr. Infancy, 1. 3. p. 605.

(c) Ibid. But he cannot be charged as bailiff or factor. 1 Eq. Abr. 283. pl. 10. Smalley v. Smalley.

(d) 1 Keb. 905. 913. Johnson v. Pie, 1 Lev. 169. 1 Sid 258. But in equity, neither infancy nor coverture will protect a party against the consequences of an assent, which bears any dishonest appearance; as where a man who has a title stands by and encourages, or does not forbid, a purchase, inconsistent with such title, he shall be bound, and all claiming under him. 9 Mod. 38. Watts v. Cresswell, cited 2 Eq. Abr. 489. Evroy v. Nichols, 1 Bro. Rep. 353. Quære, Whether this doctrine extends to acts absolutely void, as a warrant of attorney.

avoid the contract.(e) But if an infant judicially perjure himself in point of age or otherwise, he shall be punished for the perjury ; so he may be indicted for cheating with false dice.(f)

Frauds.

1. C. Also it seems, that if an infant above the age of discretion be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, he make any contract or agreement with intent afterwards to elude it by privilege of infancy, a court of equity will decree it good against him, according to the circumstances of the fraud.(g) But it seems it can only thus exert itself where the act done by the infant is *voidable* : if it be absolutely void, it cannot make it good, though there appear circumstances of fraud on the part of the infant.(h)

If an infant keeps a common inn, an action on the case upon the custom of inns will not lie against him.(i) Nor is he liable to bankruptcy, as he cannot be a trader within the statutes ; and it seems he is not liable to outlawry.(k)

(e) 1 Keb. 778. Grove v. Nevil, 1 Leon. 169.

(f) 1 Sid. 258.

(g) 3 Bac. Abr. 604. Vern. 224. 2 Vez. 212. 3 Burr, 1802.

(h) Sanderson v. Marr, 1 H. Bl. 75.

(i) 1 Roll. Abr. 2. Carth. 161. Bac. Abr. Enf. E.

(k) Co. Lit. 126. a.

Capital Crimes.

2. The age of fourteen is the common standard, at which both males and females are, by our law, obnoxious to capital punishments ; for the law presumes them at those years to be “ doli capaces,” and capable of discerning between good and evil ; and therefore subjects them to capital punishments, as much as if they were of full age. (l)

But though fourteen be the “ ætas pubertatis,” before which our law does not presume the party to be “ doli capax,” and therefore that a party indicted for a capital offence committed before these years, is to be found not guilty ; yet this general rule is subject to the following modifications.

1. That if the party be above twelve, though under fourteen, and appears to be “ doli capax,” and could discern between good and evil at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, though he hath not attained the age of fourteen. But herein, according to the the nature of the offence and circumstances of the case, the judge may or may not in discretion reprieve him, before or after judgment, in order to the obtaining the king’s pardon. (m)

(l) F. N. B. 202. Co. Lit. 247. b. Hal. Hist. P. C. 25. Hawk. P. C. 2. Forst. Cr. Law, 70.

(m) Hal. Hist. P. C. 27.

2. If an infant be above seven, and under twelve years of age, and commit a capital offence, *prima facie*, he is to be adjudged not guilty, and to be found so ; but yet if it appear, by strong and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment of death may be given against him ; for “ *malitia supplet ætatem.*” But herein the circumstances must be inquired of by the jury, and the infant is not to be convict upon his confession : also herein, says Lord Hale, it is prudence after conviction to respite judgment, or at least execution ; but he says that if he be convicted, the judge cannot discharge him, but only reprieve him from judgment, and leave him in custody till the king’s pleasure be known.(n)

3. If an infant be within seven years old, he cannot be guilty of felony, whatever circumstances proving discretion may appear ; for, *ex presumptione juris*, he cannot have discretion ; and no averment shall be received against that presumption.

If an infant under the age of fourteen be indicted by the grand inquest, and thereupon arraigned, the petit jury may either find generally not guilty ; or they may find the matter specially, that he committed the fact, but that he was under the age of fourteen, *scilicet*, *ætatis 13 annorum*, and had not discretion to discern between good and evil ; *et non per feloniam*.

(n) Ibid. See William York’s case ; a boy of ten years old, convicted for the murder of a girl five years old. Forst. Cr. Law, 70.

Felonies.

2. A. Where an act is made felony or treason, it extends as well to infants, if above the age of fourteen, as to others ;(*o*) and this appears by several acts of parliament ; as by 1 Jac. 1. c. 11. of felony for marrying two wives — where there is a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years ;(*p*) so that if the marriage were above the age of consent, though within the age of twenty-one years, it is not exempted from the penalty.

So, by the statute 21 H. 8. c. 7. concerning felony by servants that embezzle their master's goods delivered to them, there is a special proviso, that it shall not extend to servants under the age of eighteen years, who certainly had been within the penalty, if above the age of discretion, viz fourteen years, though under eighteen years, unless excluded by a special provision. (*q*)

So, by the 12th Ann. c. 7. where apprentices under the age of fifteen, who shall rob their master, are excepted out of the act.

Misdemeanors.

3. If an infant under the age of twenty-one years be indicted of any misdemeanor, as a riot or battery he shall not be privileged

(*o*) Co. Lit. 247. Hal. Hist. P. . 21, 22,

(*p*) Ante, 59.

(*q*) Hal. Hist. P. C. 22.

barely by reason that he is under twenty-one years ; but if he be convicted thereof by due trial, he shall be fined and imprisoned ; because upon his trial the court *ex officio* ought to consider and examine the circumstances of the fact, whether he was “ doli capax,” &c. (r) but if the offence charged by the indictment be a mere non-feasance, (unless it be of such a thing as the infant is bound to do by reason of tenure, or the like, as to repair a bridge, &c.) there in some cases he shall be privileged by his nonage, because laches in such a case shall not be imputed to him.

If A. kills B., and C. and D. who are present do not attack the offender, they shall be fined or imprisoned ; yet if C. were within the age of twenty one, he shall not be fined or imprisoned.(s) And general statutes that give corporeal punishment, are not to extend to infants :(t) therefore if an infant be convicted in ravishment of ward, he shall not be imprisoned, though the statute of Merton, c. 6. be general in that case. But this must not be understood only of those cases where the corporeal punishment is but collateral, and not the direct intention of the proceeding against the infant for his misdemeanor.

(r) Hal. Hist. P. C. 20.

(s) Hal. Hist. P. C. 21.

(t) Ibid. Plow. 364.

CHAP. IX.

1. *How infants are to sue ;—2. and be sued.—*
 3. *Their privileges in the courts.* 4. *The general protection afforded them by Chancery.*
And, 5. Their exemption from costs.

1. An infant, not having power to appoint an attorney, must in all cases where he is plaintiff, sue by guardian or prochein amy. (a) But if an infant, and a man of full age, are made executors, they may bring an action as executors, and the infant may sue by attorney, without making any prochein amy, because they sue in the right of the testator, and not in their own right ; and therefore he that is of full age may appoint an attorney for him that is within age : (b) for it is held in Yelverton, (130) that an infant executor cannot be sum-

(a) T. N. B. 27. 2 Inst. 261. 390. Co. Lit. 135. b. Cro. Car. 86. Hutt. 92. Jones, 177. Hetl. 52. Litt. Rep. 60. Cro. Jac. 161. 641. Bridg. 74. One authority, Palm. 296. says the suit shall be by guardian and not by prochein amy, except where the guardian will not sue, is himself to be sued, or the infant is essoined.

Advantage must be taken by plea in abatement of the infant's suing by attorney ; for since the 21 Jac. 1. c. 13. s. 2. and 4 Ann. c. 16. s. 2. it is not error after judgment, either on verdict or by default.

(b) 1 Roll. Abr. 288. Cro. Eliz. 278. 2 Saund. 212. 1 Mod. 47. 72. 296. Vent. 102. 1 Sid. 449. and see

moned and severed. And it seems that the infant must be joined, even though he have not proved the will.(c)

The respective courts in which the suit is commenced, must assign a proper guardian to the infant ;(d) and therefore if an infant be sued, the plaintiff must move to have a proper guardian assigned him. The course hath been to allow some of the officers of the court; who by reason of their skill make the best guardians, and prochein amys, for the advantage of the infant.(e) The Court of Chancery may appoint one of the Six Clerks to be guardian to an infant.(f) But if there be a guardian appointed by the father, or, ex provisione legis, as guardian in soccage, who acts accordingly, he only shall be admitted to sue for the infant, unless he hath misdemeaned himself ;(g) though it is said by Lord King, that

Carth. 124. Infant executors, not having proved the will, need not join an executor of full age, in a " Sci. Fa." on judgment for testator ; the facts being stated in the " Sci. Fa." 1 Lev. 181. Hatton v. Mascall, Raym. 198. Baron may appoint attorney for feme within age, post. In Bale v. Starkey, Cro. El. 542, it was held not to be error, though an infant *sole* executor sued by attorney.

(c) 1 Wms. Saund. 291. h.

(d) Styl. 369. Roll. Rep. 303.

(e) 2 Inst. 261.

(f) 2 Chan. Cas. 163. Where an infant resided in Germany, and his father was not interested in the suit, the court on motion assigned the father. 9 Ves. 357. Jongsma v. Pfiel.

(g) 1 Sid. 424.

no one can have a testamentary guardian for this purpose.^(h) The Court may discharge one guardian and appoint another.⁽ⁱ⁾ But the infant cannot revoke the appointment.^(k)

In the Common Pleas, a record of admittance of the guardians made; but in the K. B. it is only recited in the count. "J. S. per A. B. guardianum suum ad hoc per cur. Specialiter admissum queritur," &c.^(l) The admission of the *prochein amy*, or guardian, may be either *special*, to prosecute or defend a particular action, or *general*, to prosecute or defend all actions whatsoever;^(m) though it is said, that by the practice of the Court of K. B., a special admission of a guardian to appear in one cause will serve for others.⁽ⁿ⁾ The order for the admission should be obtained before declaration, and a copy thereof annexed to it; else the defendant is not compellable to plead;^(o) and the plaintiff's attorney, if required, must give notice to the de-

(h) 1 Str. 709.

(i) Styl. 456. 1 Ld. Raym. 555. As where the guardian would prosecute an appeal of death against the infant's will.

(k) Palm. 252. Salk. 176. Holt, 153. pl. 1. 12 Mod. 372. 1 Ld. Raym. 555.

(l) 4 Rep. 53. b. 1 Sid. 153. 342. Cro. Eliz. 158. 2 Inst. 261. 3 Mod. 236. 1 Lev. 224, Carth. 256.

(m) 1 Str. 304. Archer v Frowde.

(n) Id. 305.

(o) Sty. Pr. Reg. 264.

fendant's attorney, of the place of abode of the prochein amy.(p)

To constitute a prochein amy, or guardian, the person intended, who is usually a near relation, should come with the infant before a judge at his chambers; or else a *petition* should be presented to the judge, on behalf of the infant, stating the nature of the action, and, if for the defendant, that he is advised and believes, that he has a good defence thereto; and praying, in respect of his infancy, that the person intended may be assigned him as his prochein amy, or guardian, to prosecute or defend the action. This petition should be accompanied with an *agreement*, signifying the assent of the intended prochein amy, or guardian, and an affidavit made by some third person, that the petition and agreement were duly signed. On being applied to in either of these ways the judge will grant his "fiat;" upon which a rule or order should be drawn up with the clerk of the rules in K. B. for the admission of the prochein amy, or guardian. In C.P. the order for admission is made by the judge, and entered by the prothonotaries on their remembrance-roll.(q) An infant must assign errors, as well as sue, by guardian,(r) or prochein amy and not by attorney.

The prochein amy was first given by the statute of Westminster, 1. c. 47, and West-

(p) 1 Wils. 246. Tomline v. Brookes.

(q) Tidd, 93.

(r) Co. Ent. 289.

minister, 2. c. 15. for cases of necessity, where the infant is to sue his guardian, or is essoigned, or the guardian will not sue for him ; but for the profits received after fourteen the infant was admitted by guardian to sue an account against his guardian in soccage ; for he must charge him as bailiff : (s) and a guardian will be ordered to acknowledge satisfaction for so much as he has received on a judgment. (t)

It seems that if a party come of age before trial during a suit commenced by guardian or prochein amy, he ought to appoint an attorney forthwith ; (u) and if he omit to do so, advantage may presently be taken of his omission ; but it cannot be assigned for error. (x) In Chancery the course seems to be, to proceed in such case without any change : (y) and by 21 Jac. 1 c. 18. it is enacted, that after verdict given in any court of record, judgment shall not be stayed or reversed by reason the plaintiff in ejectment or other personal action, being under age, did appear by attorney, and the verdict pass by him.

(s) Cro. Jac. 219.

(t) Moor, 852.

(u) Cro. Jac. 580. *Stone v. March*. This was in a writ of right : the party *may* do so in other suits. Moor, 665. Palm. 229. 3 Bac. Abr. 616. and it cannot be error.

(x) Bulstr. 24. Nor, it seems, if an infant executor sue by attorney *and recover* ; for every thing shall be allowed for the advantage of " *autre droit* ;" alitre, if he fail. Poph. 130. Cro. Jac. 441.

(y) Pr. Reg. 195.

In Chancery an infant cannot bring a bill but by prochein amy ;(z) but as the prochein amy pays the costs,(a) any person may bring a bill as prochein amy to the infant, without his consent.(b)

If baron of age, and feme within age, bring an action, they may sue by attorney, and the baron appoint an attorney for both.(c)

2. Though an infant may sue by guardian or prochein amy, yet he can only defend by guardian ;(d) and if he appear by attorney it is error:(e) however, if an attorney undertake to appear for an infant, the court will oblige him to do it properly.(f) The plaintiff moves that proper guardians be assigned to the infant ; and the rule or order for the admission of a guardian should be obtained before plea, and a copy of it annexed thereto ; for if an infant defendant appear by attorney, though it be in consequence of common process, with a notice requiring him to appear in that manner, the plaintiff may obtain an order for striking out the appearance, and that the defendant may appear by guardian within a certain

(z) 3 Bac. Abr. 620. Inf. K. 2.

(a) See post. The prochein amy being liable to the costs cannot be examined for the infant, 2 Str. 1026. though his declarations may be received against him. 1 Str. 548.

(b) Abr. Eq. 72. *Andrews v. Cradock*.

(c) 2 Saund. 213.

(d) Hutt 92. Palm. 225. 1 Roll. Abr. 287, 8. F. N. B. 27. Styl. 369. Cro. Jac. 645. 2 Roll. Rep. 257.

(e) 3 Rep. 58. b. 9 Rep. 30. b. Moor, 665. Palm. 229.

(f) 1 Str. 114. *Stratton v. Burgis*.

time, (usually four or six days) or in default thereof, that the plaintiff may be allowed to name a guardian, to appear and defend for him ;(g) and a similar order may be obtained where the defendant neglects to appear at all (h)

The appearance must be entered in the name of the infant, "prædict ; Catherina' per J. S. guardian, venit et dicit quod ipsa," &c.(i)

In an action against baron and feme, the feme being within age ought to appear by guardian ;(k) and if she appear by attorney, and thereupon judgment is given against them, it is error (l)

If a common recovery be suffered, and the baron and feme, in right of the feme, (the feme being within age) be vouched, and they appear by attorney and vouch over, and so a common recovery is had, this is error ; for though the baron be of full age, yet the feme being within age she ought to have appeared by guardian ; for the husband cannot make an attorney for the wife in a matter that con-

(g) Barnes, 413. Kerry v. Cade, 418. Gladman v. Bateman.

(h) 2 Str. 1076. Stone v. Atwoll. 2 Wils. 50. Shipman v. Stephens.

(i) 8 Mod. 236. If the guardian for *defendant* is admitted *ad prosequend.* ; this is erroneous. Cro. Jac. 614. Palm, 296. but an admission *quod sequatur* is good in a common recovery. 2 Saund. 95. 1 Sid. 446. 1 Mod. 48.

(k) 26 Ap. 40. 1 Roll. Abr. 288.

(l) Vent. 185. Freeman v. Boddington, 2 Ley. 38. 2 Keb. 878.

cerns her inheritance, for then he might defeat her of her inheritance, especially in a common recovery, which is now but a common assurance; and their coming in as vouches makes it the stronger; the vouchee losing all right to the land, and giving recompense to the tenant.(*m*)

The husband cannot disavow a guardian made by the court for his wife.(*n*)

If an action of debt be brought against an infant executor, he cannot appear by attorney, but ought to appear by guardian, else it is error, because otherwise he might be at great prejudice;(*o*) for assets may be found in his hand, and judgment given to recover the debt, damages and costs "de bonis testatoris si, &c. et si non de bonis propriis," when perhaps the infant had a release or acquittance to plead, and so he shall be charged "de bonis propriis" by his ill pleading, without any remedy against the attorney; but if a guardian mispleads and loses thereby, an action lies against him.(*p*)

So, if an infant and one of full age are made executors, and an action is brought

(*m*) 1 Roll. Ab. 288. Bridg. 74. 228, Palm. 224. 244. 250. Cro. El. 379. Holland v. Lee.

(*n*) Vent. 185.

(*o*) 1 Roll. Abr. 287, 288. 3 Bulstr. 180. Forbes v. Child, Poph. 130. Cro. Jac. 420. 1 Roll. Rep. 380.

(*p*) Palm. 229, 2 Leon. 59. Cro. Jac. 641. 1 Mod. 49. As to administrator, see 1 Roll. Abr. 288. Vent. 103. 2 Saund. 213. 1 Mod. 47. 298. 3 Bulstr. 180.

against them, he that is under age must appear by guardian ;(q) and it is held that an infant executor cannot be summoned and severed.(r)

In replevin against A., B., and C., they all, per J. S. attornat, made conusance as bailiffs to J. N. and had judgment upon a writ of error in K. B. It was assigned for error, that A., one of the defendants, was an infant, and yet appeared and pleaded by attorney ; but the judgment was notwithstanding unanimously affirmed, though for different reasons. Three of the judges held that it ought to be affirmed, because the defendants are in " *autre droit*," and all make but as one bailiff, and that the disability of the servant shall not prejudice his master ; they agreed that the case of executors is the same in reason with the present case ; and that with them there is a difference where the infant is plaintiff, and where defendant ; that an avowment is in the nature of the plaintiff, and so are the bailiffs who make conusance. But Holt C. J. differed, and held this appearance of the infant was irregular, for he ought to plead *per guardianum*, and the joining the other defendants with him signified nothing, so as to

(q) Styl. 318. 3 Mod. 236. 2 Str. 784.

(r) Yelv. 130. Where an action is brought against partners, and one of them pleads infancy, the plaintiff cannot enter a " *nolle prosequi*" as to the infant, and proceed against the others, for if he does he will be nonsuited ; but must discontinue the first action, and proceed "*de novo*" against the others. 5 Esp. N. P. C. 47. *Jaffray v. Fairbairn*.

charge the infant ; for if the judgment pass against him, it shall be for the damages " *de bonis propriis*," and he shall not be amerced ; therefore where he is joined, or where he is single, there is no manner of difference in reason, for in both cases the loss is the same if judgment is against him ; but he agreed that in this case the judgment should be affirmed, because the plaintiff did not take advantage of the infancy in time, by pleading it in abatement.(s)

It is said that in Chancery a guardian cannot be otherwise appointed than by bringing the infant into court, on his praying a commission to have a guardian assigned him.(t) But if the infant resides in the country he sues out a commission to assign a guardian, and put in his answer ; and whether he pleads, answers, or demurs, still it must be done by his guardian for if it is the plea, answer or demurrer of the infant, and not of the guar-

(s) Carth. 122. 179. *Coan v. Bowles*. Show. 13. 165. Salk. 93. 205. One of the judges thought this matter might be assigned for error, though pleadable in abatement. Carth. 123. Where the defendant pleads infancy, a replication in a general form, " that the articles were necessities suitable to the estate and degree of defendant " is sufficient. Carth. 110. *Huggins v. Wiseman*. Where infancy is given in evidence under the general issue, (as it may be in cases of simple contract) it is competent to the plaintiff to answer it by proof of any matter, which might have been pleaded as reply to the plea of infancy. 1 Selw. N. P. 141.

(t) Abr. Eq. 260. *Lloyd v. Carew*.

dian, it will be irregular. When the infant neglects to appear,^(u) or to have a guardian assigned, it is a motion of course, (he being in contempt to an attachment) to pray for a messenger to bring him into court; and when he is there the court always appoints him a guardian: but it is doubted whether this can be done against a peer of the realm who is an infant, and whose person, though not sacred, is privileged.

3. Infants have many judicial privileges which persons of full age have not. Thus,

In debt against an infant for rent arrear, the defendant demurred to the declaration, and afterwards pleaded to issue, and the court held that the infant may waive his demurrer in the same term.^(x)

If judgment be given against an infant by default in a writ of right, he shall have a writ of error, and reverse the judgment for his nonage.^(y)

But this must be understood of an hereditary right, in which the infant shall not lose by

(u) A man by will charged his land with the payment of debts: the creditors filed a bill against the infant heir who appeared, but neglected to answer. An attachment was issued against him: however, as he was in Scotland, it was held he must answer by a certain time, or shew cause why a receiver should not be appointed. 2 P. Wms. 409. Leg. v. Turnbull.

(x) 2 Bulstr. 69. Quære if the court would not, on motion, give leave in the second term to waive the demurrer?

(y) Cro. Jac. 464.

default ; for there is a difference between those things which concern the hereditary right for which the parol shall demur, and those actions which are brought and grounded “ de son tort demesne,” as in waste, disseisin, or the like ; in these the infant shall not be privileged, “ quia malitia supplet ætatem.” (z)

In an assize against two, of which one is an infant, if they make default, by which the assize is awarded, and after the assize remains for default of jurors, yet the infant shall be received to plead afterwards.(a)

In an assize by an infant, if the tenant pleads an ill bar, and the infant replies, by which he makes the bar good if the plaintiff had been of full age, yet this does not make the bar good against the infant ; but if the judgment be for the tenant thereupon, this is error for the court ought to plead for the infant on account of the tenderness of his age, (b) and the judges are considered his counselors.(c) But,

In a formedon in remainder, if the tenant pleads infancy, and that the remainder descended to him, and prays his age ; and the demandant pleads that the remainder did not

(z) Cro. Jac. 467. Payment of money into court, with a plea of infancy, is not an admission of the plaintiff's demand beyond the sum paid in. 2 Esp. 482. n.

(a) 29 Ass. 36. 1 Roll. Abr. 731.

(b) 37 Ass. 5. 1 Roll. Abr. 731.

(c) Cro. Jac. 466.

descend to him, and thereupon issue is joined and found for the demandant, a final judgment shall be given notwithstanding the infancy of the tenant; for in all cases where the issue is upon a dilatory plea, and tried per pais, the judgment is peremptory. *(d)*

An infant shall be privileged from fine and imprisonment, in many cases in which persons of full age are thus punished: *(1)* as, if an infant in an assize vouch a record and fail at the day, he shall not be imprisoned, although the statute of Westm. 2. c. 25. that gives imprisonment in such a case, is general: *(e)* also, if guilty of a forcible entry, although he may be fined for the same, yet he cannot be imprisoned: *(f)* so, if an infant be convict in an action of trespass "vi et armis," the entry must be, "nihil de fine, sed par donatur quia infans." However, the "capiatur pro fine" is now taken away by 5 W. and M. c. 12.

An infant plaintiff or demandant shall not be amerced: *(g)* and this is the reason he shall not find pledges. *(h)*

AMERICAN CASES

(1) The court will not discharge an infant out of custody upon the ground of infancy, where there is no suggestion of fraud, but will leave him to use that fact in his defence. *Clemson v. Bush*, 3 *Binney's Reports* 413.

(d) 1 Lev. 163. 1 Sid. 118. 252. *Amcot v. Amcot*.

(e) Hal. Hist. P. C. 20, 21: *Bridg*. 173.

(f) Cro. Jac. 274.

(g) Co. Lit. 127. 8 Rep. 61. 3 Bulstr. 276. Palm. 518.
1 Roll. Abr. 214. 288.

(h) Cro. Car. 162.

But an infant defendant shall be amerced if he pleads with the demandant, and the matter is found against him,⁽ⁱ⁾ though he shall be pardoned of course, and the entry in such case is "*ideo in misericordia, sed par donatur quia infans.*"^(k)

But if an infant brings an action by his prochien amy, and pending the action comes of age, and makes an attorney, and after a nonsuit, he shall be amerced.^(l)

And if a "*præcipe*" be brought against an infant, and pending the plea he comes of full age, he shall be amerced for so much delay as takes place after he comes of age.^(m) Wager of law is not allowed for or against an infant.⁽ⁿ⁾

4. The interest of infants is so far regarded and taken care of in the court of Chancery, that no decree shall be made against an infant, without giving him a day to shew cause against it, when he comes of age.^(o) But he is not bound to wait till he comes of age before he seeks redress against the decree, but may apply for that purpose as soon as he thinks fit; and may do this, it is said, by bill of review, rehearing, or by original bill alleg-

(i) 1 Roll. Abr. 214. Cro. Car. 410.

(k) 8 Rep. 61. Palm. 518. Cro. Car. 410.

(l) Dy. 338. pl. 41.

(m) 3 Bulstr. 151. 5 Rep. 49. Moor, 394. 1 Roll. Rep. 294.

(n) Co. Lit. 295. a.

(o) 2 Vern. 342.

ing specially the errors of the former decree.
(p)

If there are several parties to a suit in Chancery, and it appears that any one of the defendants is an infant, and any thing is prayed against him by the decree, he must have a day given him to shew cause ;(q) the words of the decree are thus, " And this decree is to be binding on the said J. S. the infant, unless he shall within the time of six months after he shall attain his age of twenty-one years, (being served with a process for that purpose) shew unto this court good cause to the contrary."

The process is by way of " subpoena," to be served on the defendant at his coming of age : is a judicial writ, and must be returned in term time.

If he shews no cause, the decree is made absolute upon him ;(r) but when he comes of age and shews cause within six months, he may put in a new answer and make a new defence ; for it would be highly unreasonable to conclude him by what his guardian had done, who perhaps made an improper defence, or mistook the nature of the case ; and if the infant notwithstanding were to be bound thereby, it would be to no purpose to give him a day to shew cause.

(p) *Richmond v. Tayleur*, 1 P. Wms. 736.

(q) 1 Vern. 295. 232. 2 Vent. 351. The infant heir is allowed no day to shew cause where the devise is to trustees to pay debts. 1 Atk. 420. *Blatch v. Wilder*.

(r) *Abr. Eq.* 280, 281,

Therefore if a guardian put in an answer to a bill in Chancery for an infant on oath, such answer shall not conclude the infant, nor be read in evidence against him ;(s) for the effect of an infant's answer to a bill in Chancery is to no other purpose than to make proper parties, so as to have an opportunity to take depositions, and to examine witnesses to prove the matter in question ; and therefore exceptions cannot be taken to an infant's answer.(t) And in a suit against an infant, the service of subpoena to hear judgment, must be on the guardian, not on the infant.(u)

But it seems that if lands are devised to be sold for payment of debts, the lands may be decreed to be sold without giving the heir, who is an infant, a day to shew cause when he comes of age ; for nothing descends to him ; but if he is decreed to join in the sale, he must have a day after he comes of age.(x)

And it is said by the court in 9 Mod. 128. (y) that " in cases of trusts, infants are always

(s) Carth. 79. Eccleston v. Petty, 3 Mod. 259. Show. 89. Fountain v. Cain, 1 P. Wms. 504. 2 P. Wms. 401. 3 P. Wms. 237. 2 Atk. 531. Aliter, if a superannuated person answer by guardian. Abr. Eq. 281. Prec. Ch. 229.

(t) Bunb. 338. Strudwick v. Pargiter, 4 Br. P. C. 256.

(u) 2 P. Wms. 643. Taylor v. Atwood.

(x) 2 Vern. 429. Cooke v. Parsons, Pr. Chan. 185. Unless the sale be for his interest, and there is a trust to be performed, and the court can see to the proper application of the money. 3 Atk. 117. Uvedale v. Uvedale:

(y) Whitechurch v. Whitechurch,

bound by decrees of this court ; and so they are where the will of the ancestor is contested ; and it is either set aside or confirmed in equity after trial on an issue of ' *devisavit vel non*, ' or where it is otherwise set aside without a trial at law ; and there is scarcely any case where an infant hath time to shew cause against a decree ; but where it is necessary for him to join in a conveyance to complete the estate, and where such conveyance is of the inheritance, as in decrees of foreclosures of mortgagers, &c." And even in the case of foreclosure it is not permitted him to ravel into the accounts, nor is he entitled to redeem ; he is merely entitled to shew error in the decree.(z)

An infant may file a bill of review to reverse a decree, notwithstanding it hath been enrolled upwards of twenty years.(a)

It hath been holden that an infant, when plaintiff, is as much bound,(b) and as little privileged, as one of full age ; unless gross laches, or fraud and collusion, appear in the *prochein amy*, in which case the infant may open the decree by a new bill.(c) But the

(z) 3 P. Wms. 353. *Mallack v. Galton*. So an account settled with an infant, shall not be opened after a length of time, unless fraud appears, 2 Atk. 119. *Vernon v. Vaundry*.

(a) 4 Br. Ch. Rep. 441. *Lytton v. Lytton*.

(b) Even by laches in the suit. 13 Ves. 396. *Hinchinbrooke v. Shipbrooke*.

(c) 2 P. Wms. 518. *Lord Broke v. Lord and Lady Hertford*, 3 Atk. 626.

house of Lords gave Sir John Napier leave to shew cause when he came of age, against his own decree ;(d) and an infant's neglect to put in a replication shall not be taken as an admission of the truth of the answer, for an infant can admit nothing.(e)

If the court detect an incautious submission in the bill of an infant, to any thing that will be prejudicial to his interests, they will direct an amendment.(f)

An infant may put in a new answer(g) at any time before the decree is made absolute.

Under the general protection afforded to infants by the court of Chancery, an infant may by his prochein amy call his guardian to account, even during his minority ; and if a stranger enters, and receives the profits of the infant's estate he shall in consideration of this court be looked on as a trustee for the infant.(h) The court will not suffer an infant to be prejudiced by the laches(i) of his

(d) 9 Br. P. G. 301. *Lady Effington v. Napier.*

(e) 2 Atk. 377. *Legard v. Sheffield*, contra 3 P. Wms. 237. *Thurston v. Dechair*, (n. E.)

(f) 2 P. Wms. 387. *Serle v. St. Eloy.*

(g) 1 P. Wms. 504. *Fountain v. Cain.*

(h) But the court will not appoint a receiver where there is no bill filed. 1 Atk. 489.

(i) If a trustee purchase the estate of infant cestui que trust, either during his minority or after age, (Sudg. V. and P. 488.) the cestui que trust may insist on the purchase being avoided, and may reclaim his estate, allowing for any improvements that have been made. (Id. 494.)

trustees(*k*) or guardians.(*l*) It will too, with the approbation of his relations, allow him maintenance out of a trust estate, though there be no provision in the trust for that purpose ;(*m*) and make the order for that purpose, though no cause be depending,(*n*) It may change the nature of his estate ;(*o*) (and so it seems may guardians and trustees, where it is manifestly for the benefit of the infant. (*p*) Lord Thurlow stated it to be a general rule, that a trustee should not, *ad libitum*,

(*k*) 2 Vern. 368. *Allen v. Sayer*. In this case the trustees had omitted to enter within five years after a fine levied by a stranger. In the next case adduced, a guardian had suffered a doweress to recover, by omitting to set up a term.

(*l*) Prec. Chan. 151. and payments to the infant during his minority are discountenanced. 4 Ves. 369. *Lee v. Brown*.

(*m*) 2 Vern. 236. Maintenance rarely, but advancement frequently. 6 Ves. 473. *Walker v. Wetherall*. The Chancellor ordered a proper allowance for the maintenance of infants, wards of the court, who had been ill used by their father (-12 Ves. 402. *Whitfield v. Hales*.) But on a motion for increase of allowance to an eldest son, the court will not do more than direct a proper allowance. (1 Br. Ch. Ca. 179. *Barnett v. Barnett*.)

(*n*) 2 Atk. 315. *Ex parte Whitfield*, 3 Br. Ch. Rep. 88.

(*o*) 1 Vern. 435. *Lord Winchelsea v. Norecliff*, 6 Ves. 6. *Lord Ashburton v. Lady Ashburton*. Though there was no authority in the will.

(*p*) Ambl. 417. *Inwood v. Twyne*. Where there are adult and infant legatees, whose legacies are charged on a real fund, though the adults have a right to have their leg-

charge the nature of an infant's estate; but held that the trustees having applied the personal estate of the infant, in performance or satisfaction of a condition, upon which the infant was entitled to a real estate, that was not a ground for raising a trust against the heir in favour of the personal representative of the infant (*q*) The court will even decree build-

acies immediately raised, and for that purpose a sale may be necessary, and the heir offers the purchase money to be laid out as a security for the interest of the infants legacies, the court will not deprive them, in case of deficiency of recourse to the real fund. 3 Br. Ch. Ca. 19. *Dickenson v. Dickenson*.

Money in the funds, belonging to wards of the court, cannot be invested in the Accountant General's name till the Master has made his report on the account taken by him. 1 Br. Ch Ca. 56. *Bencroft v. Rich*.

(*q*) 1 Foubl. Eq. Tr. 82. note f. In application of the personal estate of infant tenant in tail, to redeem the land-tax, by persons not having authority within the act, the court will determine by analogy to the option to be reserved by guardians, &c. under the act for the personal representative of the infant to charge the estate in the possession of the remainder-man; and in all cases the court will so guard the property of an infant, as that the conversion of it shall not change the nature of it between the representatives. 11 Ves. 257. 278. *Ware v. Polhill*. In *Ashburton v. Ashburton*, 6 Ves. 6. the Chancellor directed lands purchased with the saving of an infant's estate, to be conveyed to the infant, and his personal representatives, until he attained twenty-one; because, as personal estate, he might bequeath it at seventeen.

ing leases of sixty years of an infant's estate, when it appears to be for his advantage.(*r*)

If it be represented to the court, that a suit instituted on behalf of an infant is not for his benefit, an inquiry into the fact will be directed to be made by one of the masters; and if he reports that the suit is not for the benefit of the infant the court will stay the proceedings.(*s*) So, if two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friends, the court will direct an inquiry to be made in the same manner, which suit is most for his benefit; and when that point is ascertained, will stay proceedings in the other suit (*t*)

If a legatee be of full age he shall have interest on his legacy, only from the time of his demand after the year allowed the executor: when no time is appointed the legacy is only payable on demand. But in the case of an infant it is otherwise; and he shall have interest, because no laches can be imputed to him.(*u*)

5. An infant is not liable to costs, but only his prochein amy;(*x*) and if he refuse to pay them on demand, the court will grant an at-

(*r*) 2 Vern. 224. and the guardian of infant tenant in tail is not restrained from cutting down timber. Forrester Rep. 16. Eq. Tr. Fonbl. 82.

(*s*) 3 P. Wms. 142. Da Costa v. Da Costa.

(*t*) Mitf. Eq. Pl. 27.

(*u*) 2 Eq. Tr. 429.

(*x*) Cro. El. 33. Grave v. Grave, 2 P. Wms. 297. Turner v. Turner, 2 Str. 708.

tachment against him (y) Yet where the infant plaintiff was taken in execution for the costs, the court refused to discharge him on motion ;(z) and it hath been adjudged that costs are payable by an infant defendant.(a)

If an infant by his guardian or prochein amy brings an ejectment, which is found against him, and the guardian becomes insolvent, the infant himself must answer the costs ;(b) because the rule was entered into for the infant's benefit ; and infants must not disturb the possession of others by unlawful entries, without being punished with costs.

When an infant sues, it is the practice with the court of law to stay the proceedings till the prochein amy, guardian, or attorney, hath given security for the costs ;(c) and where he has appeared to be in low circumstances, or incompetent to discharge the costs, they have, on motion, appointed a new prochein amy,

(y) Barnes, 128. Slaughter v. Talbot.

(z) 2 Str. 1217. Gardiner v. Holt, 13 East, 6.

(a) Dy. 104. 1 Bulstr. 189. 2 Str. 1217, see Barnes, 133. Thurstout v. Percivall. And where an infant brought his bill by prochein amy, but never proceeded till he came of age, when the bill was dismissed, the infant and prochein amy were both held liable to costs. 2 P. Wms. 297. Turner v. Turner.

(b) A bill by an infant was dismissed with costs, upon a fact which, though not known, might have been known with reasonable diligence when the bill was filed ; and the prochein amy was not allowed the costs out of the infant's estate. 9 Ves. 542. Pearce v. Pearce.

(c) 1 T. R. 490. Doe v. Aliton.

or guardian, of sufficient ability. *(d)* It hath been said, that a similar practice obtains in the court of Chancery, and that if the prochein amy be insolvent, the defendant may apply to have a solvent amy named. *(e)*

But in *Squirrel v. Squirrel*, *(f)* a bill having been filed by the prochein amy of a feme covert against her husband, it was moved on the part of the defendant that all proceedings in the cause might be stayed, until the prochein amy should give security for costs, or another prochein amy be named, which application was supported by an affidavit of the bad circumstances of the prochein amy. However, Lord Thurlow refused to make any order; and said he did not conceive the court could enquire into the circumstances of any prochein amy, more than those of any common plaintiff; in which case, though the plaintiff should be insolvent, the defendant cannot help himself; that in the cases of an infant or feme covert they were obliged to sue by their next friend, in order that there might be some person *suable* for the costs; (which the infant and feme covert themselves are *not*;) but that the court contended itself with making somebody *amenable*, in this respect without going into an inquiry concerning his ability.

(d) 2 Str. 932.

(e) 2 P. Wms. 297. *Turner v. Turner*.

(f) 2 Cox's P. Wms. 297, note.

And in a case(g) lately argued in the Common Pleas, the court could not oblige an infant plaintiff to give security for costs, though Mr. Justice Buller's opinion in *Doe v. Alston*, (h) was quoted.

(g) 1 Marshall's Rep. 4. anonymous.

(h) 1 T. R. 491.

CHAP. X.

1. *How Infancy is tried—on whom the Proof lies.* 2. *The Question, “What is necessary?”—by whom tried.*

1. **I**T is laid down as a rule in some books, that wheresoever it is alleged upon the pleading, that the party was and yet is under age, there it shall be tried by inspection of the court; but where the party is of full age at the time of the plea, there it shall be tried per pais (a)

But it must be observed, that, as to judicial acts, or acts done in a court of record, the trial of infancy *must* be by inspection; and therefore, if an infant levies a fine, and attempts to reverse, the writ of error must be brought during his minority, that the court may by inspection determine the age of the infant; (b) but the judges, as by *adjuncta*, may in such cases inform themselves by witnesses, church books, &c.

So, if an infant suffer a recovery by appearing in person, this must be reversed, by inspection of the judges during his minority. (c)

It is said, that in all cases where the party

(a) 1 Lev. 142. 1 Keb. 796. Cro. Jac. 59. 581.

(b) Co. Lit. 380. Moor, 76. 2 Roll. Abr. 15. 2 Inst. 483. 2 Bulstr. 330. 12 Rep. 122.

(c) Ante, chap. iv. 42.

pleads that he was within age at B., and alleges a place, that there the trial may be well enough where it is alleged :*(d)* where no place is alleged, there, in personal actions, where the writ is brought ; and in real actions, where the right of the lands depends upon infancy, the trial is to be where the land lies.*(e)*

An infant entered into a recognizance of 100*l.* (as bail to A. B.) which became forfeited, and he was taken in execution ; whereupon he brought an “*audita querela*” suggesting his infancy ; and the writ being brought into court he appeared “*in propria persona* ;” and it was moved, that he might be inspected, and his witnesses examined ; and thereupon his mother peremptorily deposed, that at that very time he was twenty years old and no more, and a maid servant gave circumstantial evidence to the same purpose ; and it was moved that he might be bailed : but, “*pér curiam*,” it is a matter of discretion, either to admit him to bail, or to refuse it, he being in execution ; but if he had brought his “*audita querela*” before he had been taken in execution, he must have a “*supersedeas*” of course : and the court would not bail him, though the long vacation was near, but required the evidence to be strengthened by a copy of the register of the parish where he was born, which being in Yorkshire, he appeared again in Michaelmas Term, in custo-

(d) Skin. 10. pl. 10.

(e) Cro. Eliz. 818.

dy ; and a copy of the register was produced and sworn to be a true copy ; and the mother and the maid being again sworn, he was discharged by the court. (*f*)

The best evidence in general that can be given of infancy to a jury are church books, (*g*) and witnesses (*g*) An almanack, in which a father had written the nativity of his son, was allowed to be strong evidence. (*h*)

The proof of infancy usually lies on the infant ; and this rule was not departed from even where the plaintiff replied a promise after twenty-one ; and it was contended he must prove the whole of his allegation ; for the fact of infancy seems to rest more immediately within the infant's knowledge, and it may be absolutely impossible for the other party to prove it. (*i*)

2. In *Mackarell v. Bachelor*, Cro. Eliz. 583 it is stated that the question, "What is necessary or not?" shall be tried by the judges, and not by a jury.

In *Coates v. Wilson*, 5 Esp. 152 Lord Ellenborough appears to have decided the question without sending it to a jury.

But it certainly was left to the jury in *Handa v. Slaney*, 8 T. R. 578., and appears to have been so in 1 Esp. 211.

(*f*) Carth. 278. Trin. 5. W. 3. Lloyd v. Eagle.

(*g*) 1 T. R. 649. Doug. 162. 170. 1 Esp. 353.

(*h*) Raym. 84.

(*i*) 1 Tr. 649. Borthwick v. Carruthers.

CHAP. XI.

Of the privilege of Infancy as to the Parol demurring.

1. *In what actions it shall be allowed.*
2. *For the Nonage of what Person.*

By the feudal law, the guardian, having the whole profits of the estate that he might be enabled to breed the infant up to arms, was not admitted, where the right of inheritance was in demand, to prosecute or defend for the infant; and the infant being incapable of acting for himself, the action was in such cases suspended till he came of âge.(a)

Hence it is, that in all cases where a naked right in fee descends(b) from any ancestor to an infant, there, in every action ancestral brought by the heir within age, the parol shall demur,(c) for the law in this case judges it

(a) 3 Bulstr. 143. 1 Roll. Rep. 325. 6 Rep. 3. b. Mar-
kal's case.

(b) For an infant, in by purchase, shall not have his age; 1 Roll. Abr. 143. Carter, 88. therefore if lessee for life surrenders to an infant, who hath the reversion by descent, he shall not have his age; for quoad strangers estate for life hath continuance. 1 Roll. Abr. 143. Co. Lit. 338. b.

(c) 6 Rep. 3. b. Dy. 133.

less prejudicial that the infant should be delayed of his right, than that he should run the hazard of losing it for ever, which he might be in danger of, by his want of knowledge in setting forth his title, &c. and the parol shall demur in equity, as in law.(d)

So in all cases on the fee ; as if an action of debt on the obligation of the ancestor be brought against the heir, there the parol shall demur, because that lays a burthen on the fee, which, by law is to be preserved entire until the infant comes of age ;(e) when also he may possibly discharge himself by pleading *rien per descent*.(f) Whether equity will decree satisfaction on such a bond, where there are no personal assets, is made a quære, 1 Vern. 178, and there said that infants may be sued in equity, and that there is no precedent that the parol should demur ; and in 1 Vern. 428. it is said by the Master of the Rolls, that he thought such a decree reasonable ; but the reporter adds a "*debitatur*."(g)

If a party recovers in an action of debt against the father, who dies ; in a "*Scire Facias*" against the heir on this judgment, he shall have his age.(h)

(d) 3 P. Wms. 368. Where a lease is made to a man and his heirs for three lives, the heir does not take by descent, but as special occupant, and parol shall not demur.

(e) 2 Inst. 89. Moor, 74. Dy. 239. pl. 39. And. 10.

(f) 1 Roll. Abr. 140.

(g) See 2 Chan. Ca. 164. 1 Lev. 197, 8.

(h) 1 Roll. Abr. 140. Co. Lit, 290.

So, in a "Scire Facias" against a terretenant, to have execution of damages recovered against J. S., if the terretenant be within age, and in by descent, he shall have his age. *(i)*

In a "Scire Facias" against the heir of him against whom the recovery was had, if the heir be in by descent from another ancestor than he against whom the recovery was had, he shall have his age. *(k)*

In a writ of annuity against an heir, he shall have his age, because he may discharge himself by saying he hath nothing by descent. *(l)*

So, if execution be sued against him on a recognizance, (though he be charged partly as terretenant, *(m)*) or statute merchant; *(n)* and an assise lies for him if ousted thereon, for the extent is void which is made on the possession of an infant *(o)*

He shall have his age too, on a recognizance in nature of a statute staple. *(p)* And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as if there be father and two daughters, and the father die, one of the

(i) 1 Roll. Abr. 140, Co. Lit. 290.

(k) 1 Roll. Abr. 139. Where the parol shall demur in a "Scire Facias" to execute a remainder limited to the ancestor, vide Moor, 16. pl. 59. 35. 114. And. 24. Dals, 37. Keilw. 204. N. Bendl, 121, pl. 152.

(l) 1 Roll. Abr. 140.

(m) Ibid. Co. Lit. 290. 3 Rep. 13. 2 Inst. 89.

(n) Co. Lit. 290. 1 Roll. Abr. 140.

(o) Hetl. 54.

(p) Bro. Stat. Mer. 33. Co. Lit. 290, &

daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which suspends the execution. *(q)* If the comoror of a statute merchant die, and his heir within age endow the widow, the land in dower shall not be extended during the minority of the heir. *(r)*

But though upon a judgment in debt, or upon a statute or recognizance, there can be no proceeding against an infant, at common law, yet it is said there may be in Chancery. *(s)*

The infant shall have his age in a "cessavit" by descent, though it be of his own cesser; *(t)* because he cannot tell what arrears have accrued; and if he does not make a true tender, he loses the whole for ever. So, in a writ of customs and services, *(u)* which is a writ of right in its nature, in which judgment final shall be given. Yet he may be distrained on for rent. *(x)*

The tenant may pray that the parol demur, if an infant brings a writ of right as heir to his

(q) Moor, pl. 203. Co. Ent. 12.

(r) Co. Lit. 290. But this must have been a case where the widow claimed by marriage prior to the incumbrance, for the privilege of the infant is personal, and does not extend to her, or to a lessee, &c. Lord Nott, MSS. Hargr. Co. Lit. 290. a. note(1) 248.

(s) 2 Chan. Ca. 164. 1 Lev. 197, 8.

(t) Co. Lit. 380, 1. 1. Roll. Abr. 138. 2 Inst. 401, aliter, if it be a purchase, Plow. 364, b. 6 Rep. 4. b. 2 Inst. 301. Raym. 118.

(u) 1 Roll. Abr. 139. 141. 9 Rep. 85. a.

(x) 9 Rep. 85. Cunny's case.

ancestor, and lays the esplees in his ancestor. *(y)* So in a formedon in reverter ; *(z)* and, in a petition to the king, in the nature of a formedon in remainder, the parol shall demur for the nonage of the petitioner. *(a)* If an infant be vouched and bound to warranty by the deed of his ancestor, the parol shall demur for nonage. *(b)*

But regularly in all real actions brought by an infant of his own possession, *(c)* the parol shall not demur ; *(d)* for the granting that the parol shall demur is a law introduced, not for the delay or prejudice of the infant, but for his advantage.

In writ of dower the parol shall not demur, in favour of dower ; for the wife must be subsisted. *(e)* So, if a woman bring a “ quod ei deforceat ” upon a recovery had of land which she claimed to hold in dower, the parol shall not demur, because it is of the nature of a writ of dower : *(f)* But if a tenant in dower be dis-

(y) 1 Roll. Abr. 137. 6 Rep. 3.

(z) Ibid. and if an infant acknowledge the action of the demandant for part, yet if the parol demurs for the rest, it shall demur for all. 1 Roll. Abr. 147.

(a) Dy. 136. Dals. 22. Moor, 35. Kelw, 205.

(b) 1 Roll. Abr. 144.

(c) As in assises of novel disseisin and mort d'ancestor, 6 Rep. 4.

(d) 6 Rep. 3. b. Cro. Jac. 467.

(e) 1 Roll. Abr. 137. 3 Bulstr. 141. 1 Roll. Rep. 323. Cro. Jac. 393.

(f) 1 Roll. Abr. 137. 3 Bulstr. 135. 138.

seised, and the disseisor die seised, his heir shall have his age against the feme.(g)

The infant shall not have his age in dower, though judgment go by default against him.(h) But he shall have it, where the feme bars her dower by fine, and after brings error to reverse the fine.(i) In Moor it is said, only where he is terretenant.

In a "quare impedit,"(k) or suit in the nature of it,(l) the parol shall not demur, because the lapse may incur during the nonage.

Nor does age lie for the defendant in a writ of partition between coparceners.(m) The same law of joint-tenants and tenants in common :(n) and in a "contribuione facienda" by one coparcener against another.(o) Nor in actions brought against him for his own wrong, as trespass, waste, disseisin, assise, &c.(p)

In an atteint against the heir of the feoffee, the parol shall not demur for the nonage of the defendant.(q)

(g) 1 Roll. Abr. 137.

(h) Cro. Jac. 111. Cro. El. 309.

(i) Cro. Jac. 392. Moor, pl. 448.

(k) 1 Roll. Abr. 138. 3 Bulstr. 131. 142.

(l) 1 Roll. Abr. 138.

(m) 6 Rep. 4. Co. Lit. 171.

(n) Hob. 179.

(o) 1 Roll. Abr. 139.

(p) 1 Roll. Abr. 140. Cro. Jac. 467. nor in replevin, though the plaintiff shew a release of infant's father, 1 Roll. Abr. 140.

(q) 1 Roll. Abr. 137.

Neither in a “per quæ servitia,”(r) or “quid juris clamat”(s) against an infant, or writ of estrepement.(t)

Nor for the nonage of the demandant in a “quid juris clamat” by him in reversion ;(u) for the nonage of the heir of the conusor alleged by the tenant in a “per quæ servitia ;”(x) nor for the nonage of the demandant in a writ of “mesne.”(y) But it shall demur if an infant in reversion brings a “quid juris clamat” against a tenant for life.(z)

The parol shall not demur for the nonage of the plaintiff in an appeal of murder ;(a) and,

By the statute of Westminster 1. c. 47. it is enacted, “that if one purchase an assise, and the principal disseisor die before the assise pass, the plaintiff shall have a writ of entry against his heir or heirs, of what age soever ; so, if the disseisee die before he hath purchased, his heir or heirs shall have, &c. so that the nonage of the heirs of either, the plea shall not be delayed ; but, as much as can, fresh suit must be made after the disseisin : so, in case of prelates, &c. where there can be no descent.”

(r) 9 Rep. 85. Co. Lit. 315.

(s) Co. Lit. 315.

(t) Dy. 104. pl. 13. 2 Inst. 328.

(u) 1 Roll. Abr. 136.

(x) Ibid.

(y) 6 Rep. 3. b. 9 Rep. 85.

(z) 1 Roll. Abr. 128. 6 Rep. 4. Co. Lit. 320.

(a) 2 Inst. 320. Dy. 137.

So, if the party die before purchase of the writ; for this is put only to shew the mischief of this particular case, whereas the body of the act is general.(b) But the writ of entry extends only to a writ in the "per," and not in the "post;" so that if the heir of the disseisor makes a feoffment in fee, and the feoffee dies, *his* heir within age, in a writ of entry against him, shall have his age.(c) So, it extends not to the vouchee or payee in aid.(d) Special heir, as in gavelkind, &c. is within the act, which extends also to the heir of the heir, as in a writ of entry in the "per and cui."(e)

By the statute of Gloucester, c. 2. "where an infant is held from the inheritance after the death of his father, cousin, grandfather, &c.(f) so that he is driven to his writ, and the tenant pleads a feoffment or other matter, whereby the justices award an inquest, the inquest shall pass as if he were of full age." But this act extends not to actions ancestral droitural; as "formedon in reverter," "dum non compos," "sur cui in vita," &c.(g)

2. In "detinue" against an executor upon a delivery to the testator, the parol shall not demur for the nonage of the executor.(h)

(b) 2 Inst. 257.

(c) Ibid. Tenant by curtesy in, in the "post" where he is the widow of heir of disseisor, *ibid.*

(d) Ibid. 2 Leon. 148.

(e) 2 Inst. 258.

(f) Put only only for example, 2 Inst. 291.

(g) 2 Inst. 291. Yet vide Bro. Age, 5.

(h) 1 Roll. Abr. 142.

In an action brought by baron and feme, for the inheritance of the feme, the parol shall not demur for the nonage of the baron, because in the right of the feme.(i) And in a writ of "mesne," brought by baron and feme in the right of the feme, the parol shall not demur for the nonage of the feme (k)

But in an action of debt brought against baron and feme, upon an obligation of the ancestor of the feme, the parol shall demur for the nonage of the feme; and in a "præcipe quod reddat" against baron and feme of land that the feme had by descent, the parol shall demur for the nonage of the feme though the baron was of full age.(l)

If lessee for life hath aid of him in remainder who is in by descent; or if tenant by curtesy prays aid of the heir within age, the parol shall demur.(m)

If two are vouched, and the parol demurs for the nonage of one, it shall for the other also;(n) and in a "Scire Facias" against the terretenants, to have execution of the damages recovered against J. S. if the parol demurs for the nonage of one terretenant, it shall for all.(o) So, if four enter into a recognizance, and one die, his heir within age,

(i) 1 Roll. Abr. 142.

(k) Ibid.

(l) Ibid.

(m) Ib. 145.

(n) Id. 146.

(o) Id. 147.

in a Scire Facias against the heir and the rest, the parol shall demur for all. (p)

The whole doctrine of the parol's demurring may be found very much at length in Roll's Abridgment, title "Age," and in Bacon's Abridgment, title "Infancy." However, as the doctrine is now, since the disuse of real actions, rarely applicable, except in "debt" against the heir on the bond of his ancestor, the preceding sketch may prove sufficient for the purpose of this volume.

(p) Ibid. 3 Rep. 13.

CHAP. XII.

Of Guardians.

1. *Of Guardian in Socage.* 2. *By Nature.* 3. *Nurture.* 4. *Custom.* 5. *Testamentary Guardian.* 6. *Guardians appointed by the Courts; whether generally, by Chancery, or by the other Courts, "ad litem."* 7. *The Guardian's interest in the Person of his Ward.* 8. *The Guardian's power over the Property of his Ward.* 9. *The Ward's Remedy against his guardian.* 10. *Summary, to ascertain what Species of Guardian an Infant shall have.* 11. *Of the Offence of marrying a Ward of the Court, without leave.*

THE statute of 12 Car. 2. c. 24. having in effect abolished guardianship in chivalry with all its oppressive incidents so detrimental to the infant, there remain six species of guardianship in force at the present day, viz. (1) Guardianship in socage, (2) By nature, (3) nurture, and (4) custom; (5) Testamentary, (6) Guardianship appointed by the courts; whether by the Chancellor, where no other guardian exists; or by any of the courts, for the mere purpose of prosecuting or defending a suit. Of these each in their order.

1. By the common law, if tenant of lands holden in socage die, the next of blood to the heir, to whom the inheritance cannot descend, shall be guardian of his body till the

age of fourteen ; and although the nature of socage tenure be in some measure changed from what it originally was, yet guardianship in socage still subsists, where lands of that kind descend to the heir under fourteen ; and though the heir after fourteen may choose his own guardian, who shall continue till he is twenty-one ; yet as well the guardian before fourteen as he whom the infant shall think fit to choose after fourteen, are of the same nature, and have the same office and employment assigned to them. Their authority is derived from the law, and not from the infant, for which reason they transact all affairs in their own name ; and the law has invested them not with a bare authority only, but also with an interest,^(a) till the guardianship ceases ; and to prevent their abuse of this authority and interest, the law has made them accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit.

If the younger brother die seised in tail leaving issue under fourteen, the elder and not the middle brother shall be the guardian in socage ; for in equal degree the law prefers him.^(b)

If tenant in tail have no brother or sister, and die leaving issue under fourteen, the next cousin of the father's or mother's side, that first seizes the heir, shall have the custody of

(a) Cro. Jac. 55.

(b) Co. lit. 83.

him, for the relation on both sides is equal.(c) But if donees in frankmarriage die, their issue being under fourteen, the next cousin of the part of the donee that was the cause of the gift (being not inheritable to the donor's reversion) shall have the custody.(d)

Where there is a brother of the half blood, he shall be guardian in socage, (except in borough English lands (e)) as next of kin to whom the inheritance cannot descend.(f)

An infant, idiot, deaf-and-dumb, &c. cannot be guardian in socage (g) But if A. be guardian in socage of B. under fourteen, he shall also be guardian in socage of another infant of whom B. ought to be guardian.(h)

Where a feme guardian in socage marries, the husband becomes guardian in right of his wife; but if she dies the guardianship ceases as to him, and goes to the next of kin to the infant, to whom the inheritance cannot descend.(i)

The guardianship shall go in like manner, where the guardian dies; and not to the executors of the guardian.(k) And a guardian in socage shall not forfeit his interest by outlawry, attainder of felony, or treason; because

(c) Co. Lit. 88. b.

(d) Ibid.

(e) Ibid.

(f) Cro. Eliz. 825. 2 And. 171.

(g) Co. Lit. 88. b.

(h) Ibid.

(i) Co. Lit. 89.

(k) Ibid.

he hath nothing to his own use, but to the use of the heir^(l)

2. Guardians by nature, are properly the father and mother; for by the common law every father hath right of guardianship of the body of his son and heir, till he attain to the age of twenty-one years.^(m) But this guardianship is in respect of the person only,⁽ⁿ⁾ and strictly speaking of the elder son;⁽ⁿ⁾ the reason why the father hath not the guardianship of his younger children, being because they cannot inherit any thing from the father.^(o) The father hath the prior title to guardianship by nature, the mother the second; and as to other ancestors, if the infant be heir apparent to two, priority of possession may decide.

While the tenure by knight's service continued, the father was entitled to the custody of the infant's person, even against the Lord in chivalry; but the mother and other ancestors were not allowed this preference, which reconciles the books, that appear to exclude the mother and all other ancestors, but the father, from guardianship by nature.^(p)

(l) Co. Lit. 88. b.

(m) Co. Lit. 84. this guardianship yields as to the custody of the person, to guardianship in socage, where the title to both concurs in the same individual; and as guardianship in socage expires at fourteen, the father seems after that period to become guardian by nature where he has a title to both guardianships.

(n) Carth. 384. 386. per Holt. Co. Lit. 88.

(o) Ibid.

(p) 3 Rep. 38. b. Radcliffe's case.

3. Guardianship by nurture also, respects only the care of the infant's person and education;(q) none can exercise it but the father or mother; and it only occurs where the infant is destitute of other guardians.(r) At fourteen, it determines both in males and females.(s)

4. By the custom of London, the guardianship of orphans under age, unmarried, belongs to the city.(t)

If copyhold lands descend to an infant within the age of fourteen, the next of kin to whom the lands cannot descend, shall be guardian of the infants' land and estate, if there is no custom to the contrary(u)

In Kent there was formerly a custom, where any tenant died, his heir within age, for the lord of the manor to commit the guardianship to the next relation, in the court of justice, within the jurisdiction of which the land lay. But the custom is now disused; because the lord appoints a guardian at his own peril, in respect of the accounts.(x)

(q) Co. Lit. 88.

(r) Hargr. Co. Lit. 87. b. note 6. A mother married to a second husband is not obliged to maintain her children by the first, but shall have an allowance from the interest of their fortunes. 1 Br. Ch. Ca. 218. *Billingsly v. Critchet*.

(s) Hargr. Co. Lit. 119. b. note 13.

(t) 3 Bac. Abr. 404.

(u) 2 Roll. Abr. 40. 2 Lutw. 1182.

(x) Lamb. 611. 912. 624, 5.

5. The first statute that gave the father a power of appointing a guardian, was the 4 & 5 P. & M. c. 8., which provides, under penalties of fine and imprisonment for years, "that nobody shall take away any maid or womanchild unmarried, being within the age of sixteen years, out of, or from the possession, custody, or governance, and against the will of the father of such maid or womanchild, or of such person or persons to whom the father of such maid or womanchild, by his last will and testament, or by any other in his lifetime, hath or shall appoint, assign, bequeath, give, or grant the order, keeping, education, and governance, of such maid or womanchild."

It has been holden that where two persons are appointed guardians under the statute, the guardianship will not survive, because the statute gives an authority to a special purpose; and being penal, ought to be construed strictly. (y)

The 12 Car. 2. c. 24, enacts, "that where any person hath or shall have any child or children, under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time "en ventre sa mere," or whether such father be within the age of one and twenty years, or of full age, by his deed executed in his lifetime, or by his last will and testament

(y) Bac. Abr. Guardian.

in writing, in the presence of two or more credible witnesses, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder, other than Popish recusants;(z) and such disposition of the custody of such child or children, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children, as guardian in socage, or otherwise."

"And such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments, of such child or children, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children, till their respective age of one and twenty years, or any lesser time, according to such disposition as aforesaid; and may bring such action or actions in relation thereto, as by law a guardian in common socage might do."

Among others, the following decisions have been made on this statute :

1. If the father devise his land to J. S. during the minority of his son and heir, in

(z) Other persons are also disabled; see 9 & 10 W. 3. c. 32. Swin. Part 3. s. 10.

trust for his heir, and for his maintenance and education, until he comes of age ; this is no devising the custody within this statute ; for the father might have done as much before the statute (a)

2. If a man devise the custody of his heir apparent to J. S., and mention no time, either “during his minority,” or for any other time, this is a good devise of the custody within the act, if the heir be under fourteen, at the death of the father ; because by the devise the *modus habendi custodiam* is changed only as to the person, and left the same as it was, as to the time ; but if the heir be above fourteen at the father’s death, then the devise of the custody is merely void for the uncertainty : for the act did not intend that every heir should be in custody till one and twenty ; *non ut tamdiu, sed ne diutius* ; therefore he shall be in this custody but so long and the father appoints ; and if he appoint no time there is no custody. (b)

(a) Vaugh. 184. A. devises lands to B. his son in tail, and makes C. overseer of his will, and willed that he should have the education of his son till he came of age ; and should receive, set, and let for the said B. the lands so devised, and account for the same, being allowed his charges. Popham, Clenct, and Fenner, held that C. was but a guardian for nurture ; and of consequence incapable of making leases or of having any interest in the land ; in short a mere bailiff. Cro. Eliz. 678. 734. Pigott and Garnish.

(b) Vaugh. 184.

3. That as the statute declares the guardianship shall continue till twenty-one, if so prescribed by the father, it shall not be determined sooner, even by the marriage of the infant.(c)

4. That this testamentary guardian hath the custody not only of the lands descended or left by the father, but of lands or goods in any way acquired or purchased by the infant, which the guardian in socage had not.(d)

5. That this guardian cannot assign or transfer the guardianship over to another, neither shall it upon his death go to his executors, or administrators; for though it be an interest, yet it is an interest joined, with a trust, which the testator might have thought such assignees unfit for. But it seems that if two or more are appointed guardians, and one of them dies, the survivor or survivors shall continue guardians; for, from the nature of the appointment, the authority must be joint and several.(e)

6. That if a person appointed guardian pursuant to this statute die, or refuse to take upon himself the guardianship, the Lord Chancellor may appoint a proper guardian.(f)

(c) 3 Atk. 625.

(d) Vaugh. 185.

(e) Vaugh. 181. 2 Atk. 15. Mellish v. Da Costa.

(f) 1 Abr. Eq. 260. Where the testamentary guardian has not acted, a guardian may be appointed on *petition*; where he has misconducted himself, a bill must be filed. 3 Br. Ch. Ca. 500. Ex parte Salter, 1 Sch. & Lefroy; 106. O Reefe v. Casey.

So, if a person appointed become lunatic, or is otherwise incapacitated to execute the trust reposed in him, or if he abuses the trust, the Court of Chancery may either totally remove him and appoint another, or by obliging him to give security, &c. hinder him from doing any thing prejudicial to the infant.(g)

7. That a copyholder is not within this statute to dispose of the custody of his infant heir; because of the meanness of his estate, and the prejudice that would accrue to the lord of the manor.(h)

8. Natural children are not within this statute, though holden to be within the statute of 4 & 5 P. & M. c. 8. But the Court of Chancery will adopt the nomination of the father, without referring it to a master, unless some objection be stated to the person nominated by the father?(i) And although a grandfather cannot appoint a testamentary guardian for his grandson, yet if he leave him an estate upon that condition, and the father do not submit to it, it will work a forfeiture.(k)

(g) 2 Chan. Ca. 237. 1 Vern. 442. 1 P. Williams 698 704. 1 Ves. 160. But though the court may thus interpose, or remove a common law guardian, (3 Ch. Rep. Hanbury v. Walker) it is said there are no instances of a testamentary guardian being wholly removed. 3 Salk. 178. Bridget Hill's case.

(h) 3 Lev. 395. Clench v. Cudmore.

(i) 2 Str. 1162. Rex. v. Cornforth. 2 Br. Ch. Rep. 583.

(k) Ambl. 306. Blake v. Leigh.

9. An appointment of a testamentary guardian by a mother is absolutely void.(*l*)

10. If the father dispose of the custody of an infant by deed, such disposition may be revoked by will. But if there be a covenant in the deed, that the father will not revoke it, a court of equity will not set it aside, unless the trust be abused (*m*)

11. As the statute prescribes no particular form of appointment, it is immaterial by what words the guardian is appointed, provided the father's intent be sufficiently apparent.(*n*)

12. And both by the 4 & 5 P. & M. c. 8, and this statute, there are express savings with respect to the city of London, and other towns, as to the custody of orphans.(*o*)

6. When, from omission in the law, the infant finds himself wholly unprovided with a guardian, he may elect one himself.(*p*) This

(*l*) Vaugh. 180. 5 Atk. 519. Ex parte Edwards.

(*m*) Finch. Rep. 323. Lord Shaftsbury v. Harman. 1 Vern. 442.

(*n*) Swinb. p. 3. c. 12. But no proof out of the will ought to be admitted (3 P. Wms. 51. Storke v. Storke) as by offering parol evidence of the testator's intention.

(*o*) Sid. 363.

(*p*) Co. Lit. 87. b. on a question with whom the infant shall reside, the infant's inclination is of weight where there is no imputation against the person he selects. 2 Ves. 374. But the court will refuse the possession of a child to its mother, if she has withdrawn herself from her husband. 10 Ves. 52. The guardian is a proper judge at what school to place his ward, or what university. 3 Atk. 721. Hall v. Hall.

may happen *after* fourteen, when the custody of the guardian by socage terminates; or *before* fourteen, when the infant has no such property as attracts a guardianship by tenure, and the father is dead without having executed his power of appointing a guardian, and there is no mother.

If the infant be too young to appoint a guardian for himself, the Court of Chancery may make the appointment for the King, as "*pater patriæ*," being the universal guardian of infants, idiots, lunatics, &c. ;(*q*) who are unable to take care of themselves, delegates this authority to his Chancellor.

This seems a sufficient ground for the jurisdiction of that court in such matters, without resorting to the supposition that its authority over them originated in usurpation.(*r*)

At all events, the Court of Chancery is now so far invested with this authority, that in every day's practice it determines as to the right of guardianship, who is the next of kin, and who the most proper guardian; so also it makes orders on petition or motion, for the provision of infants during any dispute; removes or compels guardians to give security, or punishes them for abuses committed.(*s*)

(*q*) 2 Inst. 14. 4 Rep. 126. *Beverly's case*. Staundf. Præ. 37.

(*r*) Hargr. Co. Lit. 128. n. 16.

(*s*) 2 Mod. 177. 1 Eq. Cas. Abr. 260. Gilb. Eq. Rep. 172. 8 Mod. 214. 9 Mod. 116. 135. Pr. Ch. 106. Lord Raym. 1334. 1 P. Wms. 112. 561. 3. P. Wms. 116. 118. 154. 1 Vern. 442. 1 Str. 168. 982. 3 Atk. 305. If a man

It is now settled, that an order of maintenance may be made upon a petition, without bill ;(t) and in allowing maintenance the court will attend to the circumstances and state of the family.(u)

As the court will interpose even against the authority of a father, a fortiori it will against those who derive their authority from him ; and therefore, though it cannot remove a testamentary guardian, or consider his conduct a contempt, unless the infant be a ward of court,(x) yet it may impose such restrictions, as will prevent him from prejudicing the interests of the ward.(y)

marry a ward of the court, without consent, he will be committed, although he was ignorant that she was such. (3 P. Wms. 116. Herbert's case) and there must be proper settlement made on the wife, before the contempt can be cleared. 1 Ves. Jun. 154. *Stevens v. Savage*.

(t) 3 Br. Ch. Rep. 88. Ex parte Kent.

(u) 2 P. Wms 21. *Hervey v. Hervey*. 1 Ves. 160. *Roach v. Garvan*. In some cases it will allow the principal to be broken in upon, for the maintenance of the infant. 1 Vern. 255. *Barlow v. Grant*.

(x) Qu. If such child should be a ward of court 4 Br. Ch. Rep. 101. Ex parte Warner.

(y) 1 P. Wms. 702. *Duke of Beaufort v. Bartie*. Ambl. 302. 2 P. Wms. 117. 110. note 1. 2 Br. Ch. Rep. 499. 2 P. Wms. 561. 2 Ch. Ca. 237. 1 Ves. 160. Though the right of guardianship is by nature in the father, though he may have access to his child at all reasonable times, and take her, so it be not by force ; yet where a child was advantageously situated with an executor under the will of an uncle, who had left her 10,000*l.* ; and the child

6. A. The claim of the ecclesiastical courts has, in modern times been treated as a presumption; and their power on this head has been confined merely to the appointment of guardians *ad litem*: Which latter are also appointed by the common law courts, when an infant is concerned in a suit. (z)

x It is said, that in chancery a guardian cannot be otherwise appointed, than by bringing the infant into court, or his praying a commission to have a guardian assigned him. (a) But wherever a suit is commenced, the respective courts in which it is carried on must assign a proper guardian to the infant. (b)

7. If the ward be taken away from the guardian, the statute of Westminster, 2. c. 35. gives him a writ of ravishment of ward, in which he recovers the body of the ward, and not damages only, as at common law by the action of trespass. (c)

By the equity of this statute, a writ of ravishment lies for the guardian in socage, as a appearing in court, denied she was under any force, the right of guardianship, without a bill. 3 P. Wms. 152. *Ex parte Hopkins*.

(z) Ante, ch. 9.

(a) 1 Abr. Eq. 260. *Lloyd v. Carew*. 2 Leon. 189. A petition that a guardian may be assigned, unless to carry on a suit, or protect an interest, must be pursuant to the statute. 1 Br. Ch. Rep. 556. *Ex parte Becher*.

(b) See Ante, ch. 9. But a guardian may be appointed by Chancery, though no cause is depending. 3 Atk. 813. *Ex parte Birchell*.

(c) 2 Inst. 90. 438. 9 Rep. 72. *Hassing's case*.

writ "in consimili casu." (d) And it seems that a testamentary guardian may have such writ, by the 12 Car. c. 24 which gives him the same remedies that a guardian in socage had.

If upon a habeas corpus, an infant be brought into court, and it appears, that the question is touching the right of guardianship, the court cannot deliver the infant to the guardian, for he may have a writ of ravishment of ward. But it is otherwise if the right of guardianship is not disputed. As where a young lady, a minor, who lived with her guardian, was brought up by a habeas corpus taken out by a man who claimed her as his wife: she denied the marriage, and expressed a wish to remain with her guardian; which the court ordered; and hearing that the man had a design to seize her, sent a tipstaff home to protect her. (e) A child so young as to be incapable of exercising any judgment of its own, was delivered by the court into the custody of the real guardian appointed by the father's will. (f) On a habeas corpus brought by the father of a kept mistress, aged eighteen, directed to her keeper, the court discharged her from all restraint,

(d) Co. Litt. 89. b. F. N. B. 139.

(e) Rex v. Clarkson. 1 Str. 444. The guardianship of daughters is determined by marriage, but not that of sons. 1 Ves. 91. Mendes v. Mendes.

(f) Rex v. Johnson. 1 Str. 579.

and gave her liberty to go where she pleased.(g)

8. A guardian in socage may grant copyhold estates in his own name, and such grant shall bind the heir, for he is "dominus pro tempore," and shall take the profits to his own use, though liable to account for them; and he shall keep courts in his own name.(h) It has been resolved too, that he may grant copyholds in reversion.(i)

Leases made by him are good, if they expire within the infant's minority. The guardian may make them in his own name,(k) may avow in his own name,(l) and the lessee may maintain ejectment upon them. Even if they continue beyond the time of the guardianship, they are not absolutely void, but voidable by the ward when she comes of age, or confirmable by him at that time, by acceptance of rent or other act, if he thinks fit to ratify them.(m) A guardian "pur nurture"

(g) *Rex v. Sir Francis Delaval*, in the matter of *Ann Catley*. 3 Burr. 1434.

(h) *Cro. Jac.* 55. 99. *Poph.* 127. *Owen*, 115. *Godb.* 145. 1 *Roll. Abr.* 499. 2 *Roll. Abr.* 42.

(i) *Mich.* 8 W. 3. *Lade v. Barker* in C. B. 3 *Bac. Abr.* 415.

(k) So a testamentary guardian, *Vern. Scriv.* 607. *Shaw v. Shaw*.

(l) *Vaugh.* 182. Guardian of infant tenant in tail is not restrained from cutting down timber, *Fonbl. Eq. Tr.* 82. note.

(m) *Bro. Gard.* 70. *Garden*, 19. 2 *Roll. Abr.* 41. *Cro. Jac.* 55. 98.

cannot make leases for years, either in his own name or that of the infant; for he hath only the care of the person.

A. lets land to B. for four years, and dies; and the lands being holden in socage and the heir under fourteen, the guardian in socage, by indenture before the first lease is expired, lets the same lands in his own name to B. for eight years. It was holden by the court that the first lease was surrendered, or if it could not properly be called a surrender, for want of a reversion in the guardian in socage, yet they held that the first lease was thereby determined.(n)

A woman guardian in socage marries, and her husband and she join in a lease of the infant's lands; this lease, upon the death of the husband, she may avoid, for the interest she had in the lands was in right of the infant, and therefore shall not bind her, as those acts in which she joins with her husband in parting with her own possessions.(o)

A petition made by the guardian shall bind the infant, if equal;(p) and it seems generally that those acts of the guardian are binding on the infant, which are for the benefit(q) of the

(n) 1 Leon. 158. 322. 4 Leon. 7. Owen, 45.

(o) Plow. 293. Osborne's case,

(p) 2 Roll. Abr. 256.

(q) See more on this head, ante, chap. ix. sec. 4. But where a guardian borrowed money to pay off incumbrances on an infant's estate, and promised to give the lender security, but died before it was done; though the lender's

infant, and for which the guardian can account; for so far his authority extends. Therefore he cannot present to any benefice in right of the infant, because he can make no advantage thereof, and consequently has nothing to account for.^(r) Lord Coke says, that the heir shall present, of what age soever he be; and it still remains to be seen, whether the want of discretion would induce equity to interfere where a presentation is obtained from the infant without the concurrence of the guardian.

If an answer to a bill in Chancery be put in on oath by a guardian, such answer shall not conclude the infant, nor be read in evidence against him.^(s)

And if a guardian borrows money of A. to pay off an incumbrance on the infant's estate, and promises to give a security for his money, but dies before it is given, the court will not decree A. satisfaction out of the infant's estate, though A's money is applied to pay off the incumbrance; however, if the sum dis-

money was duly applied, the court would not decree him satisfaction out of the infant's estate, 2 Vern. 480. *Hopper v. Eyles*.

^(r) 3 Inst. 156. 2 Eq. Ca. Abr. 518. *Arthington v. Coverly*. But a presentment made by the guardian in the name of the heir is a good title to the heir in a "quaere impedit," 42 E. 3. 130. And a guardian in socage of a manor to which an advowson is appendant, may have a "quaere impedit" in his own name, Hob. 132.

^(s) Carth. 79. 3 Mod. 259. 1 Show. 89. *Eccleston v. Petty*, 3 P. Wms. 237.

bursed exceed the profits(*t*) of the estate, for so much A. shall have an account, as for money due to the guardian ; and it shall be raised out of the infant's estate.(*u*)

But it has been holden that a guardian may, without the direction of the court, pay out of the profits of the estate, the interest of any real incumbrances, (as a judgment,(*x*) and the principal of a mortgage,) that are a direct and immediate charge on the land ; but not any other real incumbrances.(*y*) And therefore, where a widow, who was guardian the her son, received the rents and profits of his estate, and paid off debts by specialty, but took assignments of the bonds ; the son dying in his minority, she brought her bill against his heir, for a discovery assets by descent, to satisfy the money due by bond, she claiming the profits as administratrix to her son ; it was holden by the court that the guardian was not compellable to apply the profits of the estate of the infant heir, to pay off the bond debts(*z*)

(*t*) Which go to the administrator, 1 Abr. Eq. 261. Palmer and Danby.

(*u*) 2 Vern. 480. Hooper and Eyles.

(*x*) 2 Chan. Ca. 197. 1 Chan. Ca. 156. 1 Vern. 436.

(*y*) 1 Abr. Eq. 261., and where a mother, as guardian to her infant son, had out of his personal estate paid off a mortgage ; the infant afterwards died, and the estate descended to a remote heir, and then the mother would have had back the money, the court denied her any relief, 2 Vern. 193. Zouch and Lloyd, cited.

(*z*) 2 Vern. 606. Waters and Ebral.

A guardian cannot change the nature of the ward's estate, unless by some act manifestly for the ward's advantage ;(a) therefore, wherefore, where an estate in mortgage descends to an infant, the guardian must not let the interest run in arrear to increase the personal estate but should regularly apply the profits of the estate to keep it down.(b) And if, without direction of the court, he turns personal into real estate, this is at his peril, and he must account for the money if called on ; as where the infant dies, and his administrator demands the money (c) But the profits of the land are set against the interest.

When the particular measure proposed is doubtful in its tendency, the more prudent course for guardians or trustees to pursue, is to seek the indemnity of a court of equity, which will direct one of its officers to inquire and report whether the measure be, or be not, in its probable effect, beneficial to the infant(d)

x 9. Both a prohibition of waste, and an action of waste, lie against a guardian in socage, for a voluntary, but not for permissive waste, or waste done by a stranger.(e) And if a guardian enfeoff another in fee, of the lands of his ward, both feoffor and feoffee are disseisors, against whom, or the survivor, an as-

(a) Ambl. 370. Tallitt v. Tallitt.

(b) 2 P. Wms. 278. Jennings v. Looks.

(c) 1 Vern. 435. Earl of Winchelsea v. Norcliffe.

(d) Fonbl. Eq. Tr. 79. 2. Vern. 224.

(e) 2 Inst. 306.

size of novel disseisin is given by Westminster. 2. c. 5. So, if a guardian accepts a feoffment from his ward, he is considered a disseisor, and liable to be treated as such. (f) If he continues in possession after the full age of the heir, he is considered an abator.

But where a man who has no title to be guardian, enters as guardian into the lands of an infant, it is at the election of the infant to make him a disseisor on account of his wrongful entry, or waive the wrong, and call him to account as guardian (g) So, if guardian in socage occupy after the heir attains the age of fourteen, he may be charged as bailiff. (h)

For,

By the common law, guardians in socage are accountable to the infant, either when he comes to the age of fourteen, or at any time after. (i) And though, generally, executors cannot be parties to an action of account, yet, by Westminster 2, c. 23., if the heir makes his will (which he may do at fourteen) his execu-

(f) Bro. Disseisin, 95.

(g) 1 Roll Abr. 661. Cro. Car. 221., and he must account for the profits throughout, though the entry be not made for several years after the infant comes of age, 1 Abr. Eq. 280. Yallop and Holworthy, and see 1 Vern. 295.

(h) 2 Inst. 380.

(i) Co. Lit. 87. If a guardian takes a bond for the arrears of rent, he makes it his own debt, and shall be charged with it. (2 Chan. Rep. 97. Wale v. Buckley.) If he buys off an incumbrance of 600*l.* with 100*l.*, he shall not charge the infant 600*l.* 2 Chan. Ca. 245.

tors shall have an action of account against the guardian in socage. This privilege is now extended to executors of executors, *(k)* to administrators, *(l)* and against the executors of the guardian. *(m)*

In Chancery, an infant may by his "prochein amy" call his guardian to an account, even during minority; *(n)* and that court will permit a stranger to come in, and complain of the guardian and abuse of the infant's estate. *(o)*

A receiver, to the guardian of an infant, whose account has been allowed by the guardian, shall not be obliged to account over again to the infant when he comes of age. *(p)* A liberal allowance will be made for maintenance, where the guardian or father is distressed; but where the parent is rich, mainte-

(k) 25 E. 3. c. 5.

(l) 31 E. 3. c. 11.

(m) 4 and 5 Ann. c. 16. Co. Lit. 87. Where a transaction appears to have originated in the influence arising from the relation of guardian and ward, the court will set aside, though all accounts have been settled, and such relation is at an end, 13 Ves. 138. *Wright v. Bond*.

(n) 2 Vern. 342. 1 P. Wms. 119.

(o) 2 Ves. 484. *Earl of Pomfret v. Lord Windsor*. The guardian cannot retain any thing out of the infant's estate as a reward for his trouble, (2 Ves. 547. *Hilton v. Hilton*, and *Pierce v. Waring*, there cited :) nor before marriage release to his wife's guardian, lest it be the price of consent to a match, 1 P. Wms. 118. *Duke of Hamilton v. Lord Mohun*.

(p) Prec. Chan. 535.

nance will not be allowed, though directed by testator's will. (q)

10. It appears from the foregoing pages, — That the father and mother, while living, are *guardians by nature* to the eldest son and heir, which guardianship continues till twenty-one. — That the father and mother, while living, *guardians by nurture* to the remainder of their children; and that this guardianship determines at fourteen in males and females. (These two species of guardianship respect only the person and education of the infant.) — That the father may, by will or deed, appoint a guardian to act after his death. But, in defect of a testamentary guardian, if the infant be heir to any property holden in socage tenure, and under fourteen, he shall have *guardian in socage*, his nearest of kin, to whom the land cannot descend. Where he has no property that attracts such guardianship by tenure, or is above fourteen, (when such guardianship ceases) he shall choose a guardian for himself.

If he is incompetent to make such choice, or omits to do so, the appointment lies in the Chancellor; and in case of an action, any of the courts may appoint a guardian “*ad litem*.”

By the custom of London the guardianship of orphans belongs to the City.

(q) 1 Ves. 160. Roach v. Gervan, 1 Br. Ch. Ca. 387. Hughes v. Hughes, in Reeves v. Brymer, maintenance was allowed for time past, 6 Ves. 425. 454.

11. To marry a ward of Chancery, without the consent of the court, is a contempt of the highest nature,^(r) for which the parties concerned are liable to be committed, and indicted. But in order to render persons liable to a contempt, it must appear that they were originally concerned in contriving the marriage, and that they were apprized of the party's being a ward.^(s) Though in Mr. Herbert's case^(t) it was held, that every one was bound at his peril to notice the act of the court in committing the wardship. However, the clergyman, unless concerned in the contrivance, is not guilty of a contempt; and only punishable by the ecclesiastical law for marrying with a void licence, or out of the parish in which the man or woman resides.^(u)

A marriage in fact is sufficient to ground the contempt, though the validity of the marriage be questionable;^(x) and it is a contempt

(r) 3 P. Wms. 116. Mr. Herbert's case. Though the court ordered an information to be brought against a guardian, who married his ward (nine years old) to his son who had no estate; yet the infant not being a ward of the court, it was not held a contempt. 2 P. Wms. 561. Goodall v. Harris.

(s) 2 Atk. 157. *More v. More*.

(t) So in 16 Ves. 259. *Nicholson v. Squire*; and the parties cannot be heard in their defence, but only upon petition.

(u) 16 Ves. 259.

(x) 6 Ves. 572. *Salles v. Savignon*. But in this case both parties being foreigners, the property abroad, and the marriage solemnized in Scotland the day the bill was

to marry a ward of the court, though the infant's father be living; (y) for the court, will restrain the father from removing his child, or doing any act towards removing it out of the jurisdiction; (z) nor is even an affidavit necessary to obtain an order for such restraint.

Before a contempt for marrying a ward of the court can be cleared away, there must be a reference to the master for a proper settlement. (a)

A settlement of the ward's personal property to the husband for life, then to the wife for life, then to the children as the survivor should appoint, was varied, so as to vest a moiety in the children, on the wife's death in her husband's lifetime. (b) And under flagrant circumstances, where the husband obtained a license upon a false oath that the ward was of age, the Lord Chancellor would not approve a proposal giving him any further interest than in case of his surviving, and there being no children; and not then except by appointment in the wife's will. No costs to the husband. (c)

filed, the court did not commit the husband, but ordered him to attend to make proposals.

(y) Ambl. 381. Butler v. Freeman.

(z) 10 Ves. 52. Demmanneville v. Demmanneville. Hargr. Co. Lit. 89. a. note 70. 2 Fonbl. Tr. Eq. 224. note a. And will refuse the possession of the child to its mother, if she has withdrawn herself from her husband. Ibid,

(a) 1 Ves. jun. 154. Stephens v. Savage.

(b) Ibid.

(c) 7 Ves. 419. Millett v. Rowse.

But the making a settlement does not necessarily clear the contempt; for, upon the marriage of a female ward, in Guernsey, all parties were ordered to attend; the husband was committed and restrained from her receiving her visits; the wife quitted her residence with a friend of the husband, under an intimation that she would be compelled to do so; and when the husband, some time after, was permitted to propose a settlement, the Lord Chancellor refused to discharge him, on his undertaking to execute the settlement.^(d)

(d) 8 Ves. 74. Bathurst v. Murray.

THE LAW OF COVERTURE.

CHAPTER I.

1. *Of the general Disability incident to Coverture.*
2. *Of the Liability incurred by the Husband.*
3. *Grounds of the Wife's Exemption.*

MARRIED women are by the law of England, subject, in matters of contract, to a greater disability even than infants ;(a) for the contracts of an infant are, as hath been shewn, for the most part only voidable, while those of married women are, with few exceptions, absolutely void.

But the disabilities incident to these two conditions, arise on grounds distinctly different from each other.

(a) They are for the most part considered as *femes sole*, in those instance where they exercise powers which could not be vested in an infant. With submission, therefore, the position in the text is deemed correct ; though the converse of it is laid down, in some modern publications, and one or two old dicta.

The disabilities attached to infancy are designed as a protection, for the inexperienced, against the fraudulent ; those incident to coverture, are the simple consequence of that sole authority which the law has recognized in the husband, subject to judicial interference whenever he transgresses its proper limits.

In that variety of wills with which human nature is ordinarily constituted, it is absolutely necessary for the preservation of peace, that where two or more persons are destined to pass their lives together, one should be endued with such a pre-eminence as may prevent or terminate all contestation.

And why is this pre-eminence exclusively vested in the man?—Simply, because he is the stronger. In his hands the power allotted him at once supports itself without external interference ; give but the legal authority to the wife, and every moment would produce a revolt on the part of the husband, only to be quelled by assistance from without.

Nor is this the only reason : it is always probable that the man, by his education and manner of life, has acquired more experience, more aptitude for business, and a greater depth of judgment than the woman.

In both these respects there are sometimes exceptions ; but the ordinary course of things must be that kept in view by the law.

They who, from some ill-defined notion of justice or generosity, would extend to wo-

men an absolute equality, only hold out to them a dangerous snare.

Let the law by conferring equality on wives, once release them from that necessity of pleasing which is at present imposed upon them; and it would in fact, instead of strengthening, only subvert the empire they now enjoy. Man forgets his self-love while secure of his prerogative, and derives enjoyment even from concession: substitute for the relation in which he now stands, a jealousy of rival power, and the continually wounded pride of the stronger party would soon rouse up in him a dangerous antagonist for the weaker; he would regard rather what he had lost than what he retained; and would turn all his efforts to the forcible establishment of that prerogative which is now subdued by the dominion of female influence.(b)

(b) It is hoped that the preceding consideration of the true grounds of marital authority, may not be deemed altogether useless or misplaced; as it is only by an accurate conception of the *reason* of the law, that we can ever argue consistently on the law itself.—Mr. Fonblanque, in his note to Eq. Tr. 9, considers the disabilities imposed on married women to rest on this—"that if they were not allowed to bind their husbands, they might, by the abuse of such a power, involve their husbands and families in ruin."

It might be so while the husband *also* possesses unlimited power of charging his own estate, which could never be large enough to satisfy the demands of *two*, if by chance they disagreed. This hypothesis, therefore, only shews the policy of vesting a sole authority in *one*; but it does not explain why that *one* should be the man.

However, as it cannot be the object of sound legislation to reduce to a state of passive slavery that sex which, from its weakness and softness, stands most in need of legal protection; this necessary prerogative on the part of the man is confined within the limits, for the transgression of which redress may always be obtained.

Sir Thomas Smith says, (in his book of the commonwealth of England.)^(c) "The natural and first conjunction of two towards the making a further society of continuance, is of the husband and wife, each having care of the family; the man to get, to travel abroad, and to defend; the wife to save, to stay at home, and to distribute that which is gotten, for the nurture of the children and family: which to maintain, God hath given the man greater wit, better strength, better courage, to compel the woman to obey, by reason or force; and to the woman, beauty, fair countenance, and sweet words, to make the man obey her again for love. Thus each obeyeth and commandeth the other; and they two together rule the house, so long as they remain in one."

A necessary branch of that authority which the law has recognized in the husband, is the uncontrolled disposition of all property^(d)

(c) Book i. c. 11.

(d) Excepting freeholds, which come to the wife in her own right; in the disposition of which she must be a consenting party, see post. chap. ii., iii.

mutually belonging to himself and wife ; and immediately consequent on this, are the liabilities which he incurs on her account.

By clearly stating the extent of these liabilities, and this authority, we shall be enabled the more readily to comprehend the nature of the disability incident to a state of coverture.

2. The husband's liability may be considered under four heads ;—1st. During cohabitation. 2d. Where he has driven his wife from him, has deserted her, or by ill usage compelled her to quit him ; or she separates against his consent, but without criminality. 3d. Where they have separated by mutual agreement. 4th. Where the wife elopes, or is turned out for adultery, or after separation lives with an adulterer.

Immediately on his marriage, and during the coverture, the husband is liable to all debts contracted by his wife “ dum sola,”(e)

(e) A second husband is liable for debts contracted by his wife while living separate (and with a separate maintenance) from her former husband, 1 T. R. 5. If there be judgment against feme sole, who marries, and dies before execution, the husband is not liable. (3 Mod. 181.) But if judgment is had against baron and feme, on wife's bond entered into before marriage, and the wife dies before execution, the husband is liable. (1 Sid. 337.) So if judgment be had in a Sci. Fa. against baron and feme on a judgment against feme while sole, and feme die before execution, another Sci. Fa. may go against the husband for execution. (Carth. 30. Obrian v. Ram, 3 Mod. 186.)

whatever their amount may be, although she did not bring him a portion of one shilling ;(f) but if such debts are not recovered during the coverture, the husband, as such, is not chargeable, let the fortune he received with his wife be ever so great.(f)

However, if he be sued as her administrator, personals, (as choses in action) which after coverture come to him as such administrator, as assets ;(f) and to their amount only he is liable,(f) unless they were *expressly se-*

But where goods were bought by a single woman, who married and died without paying for them, the husband having received them was held liable in equity. (1 Cha. Ca. 295.) However it was allowed, that the widower of a married woman trader might, though he retained goods furnished her and never paid for, plead that he is neither executor nor administrator to his wife, and therefore not liable to her debts, and that all her goods belong to him by law. (Ch. Ca. 295. Eq. Cas. Abr. 60.) And a court of equity cannot make the husband liable in respect to the fortune he may have had with his wife. (1 P. Wms. 461. 3 P. Wms. 410. In equity, the creditors of the first husband may, where his wife was administratrix, follow the assets in the hands of the second husband, although the wife be dead ; (Chan. Ca. 80. 1 Vern. 309. 2 Vern. 61. 118. 1 Eq. Ca. Abr. 60, 61.) and at law, during her life. (Cro. Car. 603. 1 Roll. Abr. 351.) But he is only liable for waste committed during coverture. (2 Vern. 118. *Sanderson v. Crouch.*)

(f) 3 P. Wms. 409. *Heard v. Stamford*, Ca. Temp. Talb. 173. S. C. But if a man marry a widow, he is not bound to maintain her children, 4 T. R. 118. 4 East, 76. unless he holds them out to the world as part of his own family, 8 Esp. N. P. C. 1.

cured to him by settlement made on adequate consideration (g) And if the wife survive the husband, an action may be maintained against her for the recovery of debts contracted *dum sola*. (h)

1st. The husband is liable for all contracts made during cohabitation, by the wife, (i) for necessaries (j) suitable to his degree and estate; and the misconduct, or even adultery (k) of the wife, in that situation, does not discharge him from this liability; from the very circumstance of cohabitation, and from the goods being consumed in his house, (but not from any power originally in the wife to charge the husband) (l) the law implies the husband's assent to such contracts of his wife; the wife's necessity and the husband's degree

(g) 9 Ves. 87.

(h) 1 Camp. N. P. C. 189. *Woodman v. Chapman*, Per. Lord Ellenborough, C. J.

(i) 1 Roll. Abr. 351. 1 Lev. 4, 5. 1 Salk. 116, 118, 119. 1 Keb. 69. 80. 87. 1 Bac. Abr. Bar. and Feme, H. 482, 1 Sid. 121. 126, 127.

(k) 1 Salk. 119. 6 Mod. 172. 1 B. and P. 226.

(l) Per Holt, C. J. 2 Ld. Raym. 1006.

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(1) Where the husband and wife separated without any provision being made for her maintenance, it was held that the husband was liable for necessaries furnished to her, suitable to her condition in life and, that what such necessaries are must be determined by a jury. *Lockwood v. Thomas*. 12 Johns Rep. 248.

and circumstances, are, where disputed, to be determined by a jury. *(m)*

But cohabitation, and even consumption of the articles furnished, in the husband's house, *(n)* are only presumptive evidence of his assent, *(o)* which may be rebutted by contrary evidence. *(1)*

If therefore, during cohabitation, it be proved that the husband especially warned this or that tradesman, not to furnish his wife, he shall, as to the demand of such, rest discharged; *(p)* for he might have entertained reason-

(m) Per Hale, C. B. in *Manby v. Scot*, 1 Bac. Abr. 498. 1 Sid. 121. 126. A tradesman recovered for silver fringes to a petticoat and sidesaddle (value 94*l.*) furnished to the wife of a serjeant-at-law, in four months, *Skin.* 349.

(n) 1 Sid. 121. 126.

(o) In a special verdict this assent ought to be found, *ibid.* If a man cohabits with a woman to whom he is not married, and permits her to assume his name, and appear to the world as his wife, he becomes liable, although the tradesman be acquainted with her real situation, 2 Esp. N. P. C. 637. *Watson v. Threlkeld*; and he cannot set up bigamy as his defence, 1 Campb. N. P. C. 245. *Robinson v. Nation*. However, he would not be liable, after separation from such a woman, even though she left him on account of ill usage, and after a cohabitation of many years. *Monro v. De Chemant*. Trinity Sittings, 1815.

(p) 1 Salk. 118. *Etherington v. Parrott*, 2 Ld. Raym. 1096. *Boulton v. Prentice*, Str. 1214. Where excessive

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Where a husband permits his wife to act in any particular business, ~~him~~ he is bound by her acts and admissions which may be given in evidence against him. *Fenner v. Lewis*. 10 Johns. Rep. 38.

able objection to *them* in particular ; and during cohabitation the law will intend that he somewhere provided his wife with necessaries (1) or the credit to procure them. which, if he omit to do, she has her remedy in the spiritual court. (q)

And warning given to a tradesman's servant, is a sufficient warning to the master. (r)

But the husband is not liable at law for money borrowed by his wife, even though that ~~that~~ money be applied to the purchase of necessaries, (s) or to the redemption of her clothes that have been pawned : (t) neither is he liable if she takes up goods, and, before they are made into clothes, pawns them ; (*secus* if made up and worn, and then pawned ;) (u)

quantities of apparel were delivered to a woman on her personal credit, and the payment attempted to be secured by her promissory note ; the goods having been furnished without the husband's privity, he was held not liable, 3 Campb. 22. Metcalfe v. Shaw.

(q) Per Holt, C. J. 2 Ld. Raym. 1006.

(r) 1 Salk. 118. pl. 10.

(s) 1 Salk. 387. However in equity the creditor will be allowed to stand in the place of the tradesmen, and to have satisfaction as far as they could had they been plaintiffs. Prec. in Chan. 502. Harris v. Lee. 1 P. Wms. 482.

(t) 2 Show. 283.

(u) 1 Salk. 118. pl. 10.

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(1) Cohabitation is evidence of the husbands assent to contracts made by his wife for necessaries, and it can be repelled only by previous dissent or notice not to trust her. McCutchen v. McGahay. 11 Johns. Rep. 28.

nor where the contract is otherwise illegal. As where the keeper of a sponging-house within the rules of the Bench, supplied with necessaries a feme covert convicted of conspiracy (to charge her husband with subordination of perjury) and committed in execution for a year. The Chief Justice ruled that an action would not lie against the husband: for the wife's being in the sponging-house was illegal, she not being such a prisoner as was entitled to the benefit of the rules. (x)

If after an elopement the wife return, (1) the husband is reconciled, and receives her again, he becomes liable to the contracts entered into by his wife after the reconciliation, precisely to the same extent that he was liable before her elopement. (y)

(x) *Fowles v. Sir John Dyneley*, 2 Str. 1122. in Lev. 16. it is ruled that the husband is not liable for diet and lodging furnished his wife in a prison, unless he assented to it.

(y) 1 Salk. 119. 4 Esp. N. P. C. 42. in 6 Mod. 172. *Robinson v. Gosnold*. Holt, J. says, if he lie with her but a night he becomes liable for the debts she contracted during her absence. See also 4 Barn. and Ald. 252.

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(1) Where a wife left her husband voluntarily and without sufficient cause, and afterwards made an application to return through a third person whose authority was not questioned—it was held that this was equivalent to an application by the wife herself, and that the husband's liability to pay for her necessaries was revived at the time of the application. *McGahay v. Williams*. 12 Johns. Rep. 293.

2d. Where the husband deserts^(z) his wife, turns her away without any reasonable ground,^(a) or compels her by ill usage to quit him, his liability is the same as that to which he is subject during cohabitation, with this special addition, that though under such circumstances he advertise her, and caution all persons not to trust her, or even give particular notice to an individual,^(b) still he would be liable for necessities furnished to her; for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expenses; besides, he appears to be a wrong doer, and therefore has no right to prohibit anybody. But where, (without actual criminality on her part, or ill usage proved on his,) the wife leaves her husband against his consent, the husband may give a particular prohibition to an individual; and though a *general* prohibition not to supply his wife was held void^(c) in such case, so that the husband might seem liable notwithstanding it; yet in a later case,^(d)

(z) 2 Str. 1214. Where a wife died in her husband's absence, her father recovered against him for her funeral expenses, 1 H. Bl. 90.

(a) Ld. Raym. 444. 4 Burr. 2177.

(b) Per Lord Kenyon, 4 Esp. N. P. C. 42 Harris v. Morris, 2 Str. 1214. Boulton v. Prentice, 1 Esp. N. P. C. 441.

(c) Agreed by all the judges in Manby v. Scott. 1 Sidf. 127.

(d) Child v. Hardaman, 2 Str. 375.

Lord Raymond said the tradesman trusted the wife at his peril, and that the husband was not liable where she elopes from him, though she does not go away with an adulterer, or in an adulterous manner.(1) This was a *Nisi Prius* case, and the wife had lived in a very lewd manner before her elopement, though not after. But in *Boulton v. Prentice* (as reported in Mr. Ford's MS. note, Selw. Ni. Pri. Bar. and Feme, 193) the court said, without any qualification of the position, "If a wife leaves her husband he is not in that case answerable for her contract." So that even a particular prohibition, in such case, may seem unnecessary.

3d. Where the wife lives separate, and the husband agrees to make her a separate allowance, and *pays it* ;(e) if it be the general reputation of the place where the husband

(e) Covenants by the trustees of the wife's separate allowance, to indemnify the husband against her debts, are intended as a protection against the costs he may incur by being sued for them; and against debts prior to the separation, Gilb. Eq. Rep. 152. *Angier v. Angier*, 2 Br. Ch. Rep. 90. *Stephens v. Olive*.

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(1) If the husband turns away his wife, he gives her a credit, wherever she goes, and must pay for necessities furnished her, but if she runs away from him though not with an adulterer, he is not liable on any of her contracts, not even for necessities, although the person, crediting her, had no notice of an elopement.

Persons, crediting a wife so circumstanced, are bound to enquire at their peril.—The husband is bound to pro-

resides that he and his wife are living apart, (1) the husband is not liable even for necessaries, although the tradesman who furnished them (2) had not at the time of the contract been individually informed of the separation; (f) where the demand is for necessaries, however, it is incumbent on the husband to shew that the tradesman had notice of the maintenance; (g) but the general reputation of the place, if he were aware of it, would probably be considered sufficient notice.

(f) 1 Salk. 116. Ld. Raym. 444. Todd v. Strokes. If the husband pleads a separate maintenance, he must aver payment of it, 2 New Rep. 152. Nurse v. Craig; and it cannot be set up as a defence, where the trustee appointed has not executed the deed, 3 Esp. 255.

(g) 3 Esp. N. P. C. 250. Per Lord Eldon, in Rawlins v. Vandyke, where see how far the husband is liable for necessaries furnished his children living with the mother apart; and he is liable for unnecessary articles, if, being present when they were furnished, he did not enforce the tradesman's demand to have them returned, 1 Campb. 120, for he is liable for the appearance he allows her to assume, however disproportionate to his real circumstances: but not for more than necessaries, if the tradesman neglects to ascertain the husband's true situation. Ibid.

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vide for his wife at home, but not *where she pleases*—Her duties *while cohabiting* form the only consideration of his liability for her necessaries. *McCutchen v. McGahay*. Johns. Rep. 281.

(1) Vide Baker v. Barney, 8 Johns. R. 72. Fenner v. Lewis. 10 Johns. R. 38.

(2) Vide *McCutchen v. McGahay*. 11 Johns. Rep. 281.

Under these circumstances, it will be presumed that they who deal with the wife, trust her on her own credit.(*h*) and at their own peril;(i) it imports them therefore to make strict inquiry as to the terms of the separation;(i) for, as we have seen, they will probably fail to recover if they sue the husband; and it is now determined that the wife, in such case, cannot be sued alone.(*k*)

But if the husband, neglecting his agreement,(1) omit to pay the alimony, he is liable to the same extent as during the cohabitation;(l) and where the husband claims to be discharged from liability as to his wife's debts, in respect of her having a separate maintenance, it seems that it must be a provision proceeding from himself, and not from a third person.(*m*)

(*h*) 1 Salk. 116. pl. 6. *Ld. Raym.* 444. 1 *Sid.* 124. 12 *Mod.* 245. 6 *Mod.* 171. *Skin.* 348. pl. 18. If the tradesman has notice he will be nonsuited, *Selw. Ni. Pri.* 292.

(i) *Ozard v. Darnford*, *Sittings after M. T.* 20 *Geo.* 3. Per Lord Mansfield, 1 *Selw. Ni. Pri.* 281.

(*k*) *Marshall v. Rutton*, 8 *T. R.* 545. Though living in adultery; and having a separate maintenance. But see 1 *B. and P.* 338. *Cox v. Kitchin*.

(*l*) 2 *Bos. and Pull. New Rep.* *Nurse v. Craig*, 148. and *indebitatus assumpsit* lies against him, *ibid.* *Ozard v. Darnford*, 1 *Selw. Ni. Pri.* 291.

(*m*) 4 *Burr.* 2177.

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(1) Where the agreement is not reduced to writing; and there is no evidence of any payment having been made by him to her, the husband is liable. 8 *Johns. Rep.* 72.

If the husband has once entered into a bond to trustees for separate maintenance of his wife, it appears her adultery could not be pleaded to an action on such bond, though she was guilty, and the husband ignorant of it, when he entered into a bond.(n)

4th. If the wife elope from her husband,(1) and live in adultery, he cannot be charged by her contracts, even for necessities.(o) So, where the husband turns his wife out of doors, on account of her having committed adultery under his roof.(p) And although the husband be the aggressor by living in adultery with another woman, and though he turned his wife out of doors at a time when there was not any imputation on her conduct; yet, if she after commit adultery, the husband is not bound to receive or support her; nor is he liable for necessities which may have been

(n) 1 N. R. 121. *Field v. Serres*. Or guilty afterwards, 13 Ves. 439.

(o) 1 Str. 647. *Morris v. Martin*, 1 Str. 706. *Mainwaring v. Sands*.

(p) *Harn v. Toovey*, *Middlesex Sitting*, 47 Geo. 3. MSS. Selw. Ni. Pri. Baron and Feme, 290. But where the husband left his wife, who had committed adultery, still living in his house, and bearing his name, he was held liable, unless the plaintiff knew the circumstances, 1 B. & P. 226.

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(1) Vide *Lockwood v. Thomas*. 12 Johns Rep. 244. *McCutcher v. Mc'Gahay*. 11 Johns Rep. 281. *Mc'Gahay v. Williams*. 12 Johns Rep. 293.

provided for her after the the crime.(q) If the husband be reconciled, and receive his wife again, his liability recurs as during coverture.(r)

And the estate of a deceased husband is subject to the funeral charges of his wife, though she had a separate maintenance which she disposed of by will.(s)

3. Where a woman living separate from her husband, has a separate property or maintenance, her creditors may obtain redress against her in equity. If she have no such property, they trust at their peril, and are without remedy against her.(1) The following are the principles, as laid down by Lord Kenyon, on which it has been established, that a woman cannot be sued at law for debts incurred by her during the coverture,

(q) 6 T. R. 603. *Govier v. Hancock*.

(r) 1 Salk. 119. 4 Esp. N. P. C. 42. 6 Mod. 172. In the latter case he is said to be liable for debts incurred by the wife in her absence.

(s) 9 Mod. 31. *Bertie v. Lord Chesterfield*.

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(1) If the husband and wife part by consent, and he secures to her a separate maintenance, suitable to his condition in life, and pays it, he is not liable even for necessities furnished her. And the general reputation will in that case, be sufficient. *Baker v. Barney*, 8 Johns. Rep. 72.

But where the separation agreement was not reduced to writing and there was no evidence of payments made, the husband was held liable for goods furnished after the separation. *Ibid*.

Vide *Lockwood v. Thomas*. 12 Johns. Rep. 248.

Vide *Edwards v. Davis*. 16 Johns. Rep. 281.

even though she live separate from her husband.(1)

The plaintiff, in such a case, rests his claim on an agreement between the defendant and her husband to live separate: This is a contract supposed to be made between two parties, who, according to the text of Littleton, being in law but one person, are on that account unable to contract with each other; if the foundation fail, the consequence is that the whole superstructure must fail also. This difficulty meets the plaintiff in limine: if it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact would be valid, which has for its object the contravention of the general policy of the law, in settling the relations of domestic life, and which the public is interested to preserve: and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married, introducing all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character.

How can it be in the power of any persons,

AMERICAN CASES.

(1) A *feme covert* cannot bind herself personally by a contract. *Johnson v. Parmely*. 17 Johns. Rep. 271.

If a *feme sole* marries after a report made in her favour, the husband must be made a party by *scire facias* to the judgment. *Ibid*.

by their private agreement to alter the character and condition which by law results from the state of marriage, and from thence to infer legal rights of action and legal responsibilities, as consequences following from such alteration of character and condition? or how can any power short of that of the legislature, change that, which by the common law of the land is established as the course of judicial proceedings.

The argument in favour of the plaintiff, rested on this position only, as a principle, viz. that where the husband ceases to be the protector of his wife, and is not liable to have any claim made on him for her support and maintenance, it necessarily follows, that she must be her own protectress, make contracts for herself, and be responsible for them. But if this were a necessary consequence, it would hold in all cases. But that is not so; for if a woman should elope from her husband, and live in adultery, he is not liable by law to answer for her necessities; and no case has decided that the woman is. A wife living apart from her husband, and who has property secured to her separate use, must apply that property to her support, as her occasions may call for it; and if they who know her condition, instead of requiring immediate payment, give credit to her, they have no greater reason to complain of not being able to sue her, than others who have nothing to confide in but the honour of those they

trust;(1) from the incapacity of a married woman to contract, or to possess personal property, which may be the subject of contract, men and their wives, desirous of living separate, have found it necessary to have recourse to the intervention of trustees, in whom the property of which it is intended she shall have the disposition, may vest uncontrolled by the husband, and with whom he may contract for her benefit; but in such property the woman herself acquires no legal interest whatever. Of such trusts, courts of Equity alone can take notice; they can cause the fund to be brought before them, and supplied as in justice it ought to be; and in those courts the creditor must prefer his claim. (t)

(t) 8 T. R. 546. *Marshall v. Ratton.*

AMERICAN CASES.

(1) All persons supplying the necessities of a married woman living separate from her husband, are bound to enquire as to the circumstances of the separation, or they give her credit at her peril. *McCutcher v. McGuay*, 11 Johns. Rep. 282.

CHAP. II.

Of the husband's interest in his wife's property.—1. Land; 2. Personals; 3. Choses in action.

THE husband, by marriage, becomes only so far master of his wife's freehold property, as to receive the profits of it during her life, :*(a)* he has no power to sell or demise it without her concurrence ;*(1)* and if he do so, the wife or her heirs may enter after his death :*(b)* But

(a) However it vests in him a freehold, so that he may make a tenant to the præcipe for suffering a recovery of his wife's estate, without her previously joining in a fine. Cruise on Recoveries, 38. Hargr. Co. Lit. 325. b. note 2. and there may be a remitter (Co. Lit. 351.) or he may take a release on it (299) 273. b. But neither he nor his executors are accountable for the *profits*, though his real and personal assets will be liable to answer for the covenants of his marriage articles (2 Eq. Abr. 147. Harrison v. Constantine, 2 P. W. 82.) except where the estate is vested in trustees, and the husband receives the rents under an agreement for the purchase of the estate. 2 Br. Ch. Ca. 51. Pitt. v. Jackson.

(b) 32 H. 8. c. 28. the same law, of property accruing to the wife during coverture. Co. Lit. 351.

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(1) As to the interest of the husband in lands by which he is seised *jure uxoris* and in lands given to him and his wife, Vide Jackson v. Stevens. 16 Johns Rep. 11.

the marriage is a gift in law to the husband of all the wife's chattels real,^(c) as a term for years, estate by elegit, &c. ; and these he may alone dispose of, forfeit, or they may be extended,^(d) or sold,^(e) for his debts. However he cannot devise them; and if he omit to make disposition of them in his lifetime, they survive to his wife.^(c)

But an assignment by the husband, of the term of his wife, will bind her, though it be made without consideration ;^(f) so, even if a judgment is given in trust for a feme sole who marries, and by consent of trustees is in possession of the land extended the husband may assign over the extended interest ; and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without consideration ; for it is in

(c) Co. Lit. 46. b. 351. The husband is only possessed of a term in her right, and the term or legal interest continues in her. 7 H. 6. 2. 1 Roll. Abr. 342. Co. Lit. 351. Chattels accruing to the wife during coverture, subject to the same law.

(d) That is, under an elegit on a judgment, or extent on a recognizance, it is said the term cannot be sold under a Fi. Fa. 1 Roll. Abr. 344. G. pl. 6, 7.

(e) According to Co. Lit. 451. only for the life of the feme.

(c) See note,^(c) preceeding page.

(f) Quere. Whether an *agreement* by a husband for a part of his wife's term, will bind her as the actual lease does. 6 Ves. 394. Druce v. Denison.

nature of an extent.(g) The following cases will serve to shew more fully the nature and extent of the husband's interest in his wife's chattels real.

A woman, lessee for years, takes husband, and he afterwards purchases a new lease of the same lands to them both for their lives; this is a surrender in law of the first term, and shall bind the wife,(i) because it amounts to an actual disposition thereof, which the husband had power to make.(h)

If the husband, possessed of a term of seventy years in right of his wife, makes a lease of those lands for twenty years, to begin after his death, this is good, and shall bind the wife;(i) because the term being but a chattel, he had power to dispose of it wholly, and by consequence may dispose of any less interest thereout, as he thinks fit; and this being a present disposition which he cannot revoke, binds the interest of the lands immediately,

(g) 3 P. Wms. 200. If a husband, having survived his wife, dies during the suspense of a contingency upon which any part of his wife's property depended, the representative of the husband is as much entitled to this species of his wife's property as to any other. Hargr. Law Tracts, 475. And if administration "de bonis non" of the wife, be obtained by any third person, he is trustee for the representative of the husband. 1 P. W. 378. 382.

(h) 2 Roll. Abr. 495.

(i) Poph. 5. 97. 145. Co. Lit. 46. b. 351, a. Cro. Car. 344. Plowd. 418. Cro. Eliz. 33. 279. Co. Lit. 300. a.

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(1) Vide Jackson v. Halloway. 7 Johns. Rep. 81. Jackson v. Steven s. 16 Johns. Rep. 110.

though it takes not effect in possession till after his death ; and therefore differs from a devise ; for that not taking effect, nor binding the interest at all till after his death, comes too late to prevent the operation of law, which immediately on his death casts the term on his widow : But as to the residue of the term, whereof the husband made no disposition in his life, the wife, if she survives him, will be entitled to it, *(k)* because as to that the law is left to operate as it would have done for the whole, if he had not prevented it by such his disposition of part ; but if the husband had granted away the whole term upon condition, and died, though the condition were afterwards broken, and his executors entered for breach thereof ; yet would the wife be forever barred, to claim any interest in the said term ; *(l)* because there was a total disposition thereof by the husband in his life-time, and the breach or nonperformance of the condition was but contingent : had the condition been broken during his life, and he himself had entered for such breach, it seems the wife surviving should have had the term after his death, because by his re-entry he was restored to the whole term in statu quo, that is, in right of his wife. If the husband should grant a rent, common, &c. out of such term, and die, this would not bind the wife surviving, because the term or possession itself being left to come entire to the wife, all intermediate char-

(k) Cro. Eliz. 33. 1 Roll. Abr. 343, 344. Co. Lit. 46. b.

(l) Co. Lit. 46. b.

ges or grants thereof by the husband determine with his death.(*m*) But a grant by the husband of the herbage or vesture of such land, will, after the husband's death, enure to the grantee, because they are part of the land itself.(*n*)

It appears too, that if the husband makes a lease of part of his wife's term, reserving rent, and dies, that his executors shall have the rent,(*o*) and not the wife. And if the husband and wife be ejected of a term in right of the wife, and the husband bring an ejectment in his own name, and have judgment to recover, this is an alteration of the term, and vesteth it in the husband.(*p*)

But if a lease be made to baron and feme,(*1*) for term of their lives, the remainder to the executors of the survivors of them, and the husband grants away this term and dies, this shall not bar the wife, for that she had but a possibility, and no interest.(*q*) This possibility was of such a nature, that it could

(*m*) 1 Roll. Abr. 344.

(*n*) Ibid.

(*o*) Poph. 145. 3. Keb. 299. Co. Lit. 46. b. But the wife shall have the residue of the term; and so a disposition of part, is not a disposition of the whole. Ibid.

(*p*) Co. Lit. 46. b.

(*q*) Ibid. So, in a promise to pay the wife so much if she survives the man she marries, 1 Roll. Abr. 343. 1 Salk. 327.

AMERICAN CASES.

(1) Vide Jackson v. Carey. 16 Johns. Rep. 302. Whitbeck v. Cook and wife. 15 Johns. Rep. 483.

not happen in the lifetime of the husband ; but if he marry a woman entitled to such a possible or contingent interest, as on the determination of the previous estate, or happening of the contingency, will immediately vest in possession in the wife, the husband may assign it.(r)

If a term of years be granted to a feme covert and another ; or if a feme sole and another be joint-tenants of a term for years, and the feme take husband, yet in both cases the joint-tenancy still continues ; for the marriage makes no severance of it, but gives the husband the same power the wife had before, by an actual disposition of her moiety, to break the joint-tenancy, and bind his wife's interest therein : but without such disposition the joint-tenancy continue ; and if the husband dies, the whole shall go accordingly : So, if such joint-tenants are ousted of the term, the wife shall join with the husband and other joint-tenant in ejectment, and the wife shall have judgment to recover as well as the husband ; and if, in such case, before any actual disposition made by the husband, the wife die, the whole term shall go to the surviving joint-tenant, and no part thereof to the husband.(s)

(r) Hargr. Co. Lit. 351. Note 1. Prec. Ch. 418. 2 Vern. 270. 2 Atk. 207. *Bates v. Dandy*, or discharge it before hand by his release. 1 Salk. 326. A possibility is properly a contingent interest, carved out of a term, by executors' devise. Hargr. Co. Lit. 351. Note 1. See *Lampet's case*, 10 Rep. 51.

(s) Plow. 418. Co. Lit. 185.

A lease was made to the husband and wife, for years; they enter, and the lessor afterwards enfeoffs the husband, who dies seised: it was held that the husband, by acceptance of the feoffment, had surrendered and extinguished the term, and that the wife was barred of any title thereto: that it would have been otherwise, had the conveyance been by bargain and sale enrolled, or by fine; for these meddle not with the possession, but only carry such interest as the reversioner has in him; and then the husband might have the term in right of his wife and the indenture in his own right.^(t) But it is a question whether, in this case, the term would not be surrendered by the operation of the bargain and sale, or fine; for the lease being made after marriage, when there are no moieties between husband and wife, the husband cannot be said to be possessed thereof in her right more than in his own, but both are possessed by entireties; therefore it should seem that in that case likewise the term would be merged.

However, a bargain and sale by a husband, of a term for years, possessed only in right of his wife, with the mere words "Bargain and Sell," omitting "grant," "assign," or any other word which would have passed the legal interest of the term, will not bar the wife after her husband's death;^(u) for by a bargain and sale nothing passes but a use, so

(t) Cro. Eliz. 912. Downing v. Seymour.

(u) Moor, pl. 304.

that this is no disposition of the legal interest of the term⁽¹⁾

The husband may dispose of a term settled on the wife in trust, as well as if the legal interest were in her: ^(x) But it is an exception to this rule, (at least in equity,) "that if a future or executory interest in a term or other chattel, be provided for the wife, with the consent of the husband, the husband cannot dispose of it from her, and defeat his own agreement." This supposes the provision to be made *before* marriage; for if *subsequent*, it is a mere voluntary act, and void against an assignee, for valuable consideration. ^(y)

(x) 1 Roll. Abr. 343. Lane, 54, 5.

(y) Prec. in Ch. 418. Tudor v. Samyne. 1 Ch. Ca. 225. Doyly v. Perfull. 1 Vern. 7. 18. 1 Eq. Ca. Abr. 58. How far a conveyance after marriage, (by a husband, to trustees for his wife, in consideration of her having paid his debts,) will be good against creditors, see 6 E. R. 257. Dewy v. Bayntun. Where being made bona fide, without intention to defraud creditors, it was held good. A settlement made after marriage is good against creditors, if the husband was not indebted at the time, or immediately afterwards, so that no intention can be inferred, that a fraud should be committed. (1 Ves. 27. 3 Ves. Jun. 617. 3 Rep. 80. b. 2 Ves. 1. 11. 2 Atk. 481.) But not against purchasers for a valuable or good consideration. Cro. Jac. 158. 2 Ves. 10, 11. 2 Br. C. C. 148. Cowp. 278. 705. If made in consideration of

AMERICAN CASES.

(1) Vide Jackson v. Stevens. 16 Johns. Rep. 110. Jaques v. Meth. Epis. Church. 17 Johns. Rep. 548.

2. All personals, as money, goods, cattle, household furniture, &c. that where the property (z) and in the possession of the wife at the time of the marriage, (a) are absolutely vested in the husband ; (1) so that of these he

the wife's fortune, or any increase to it, the settlement is good against purchasers also. Pr. Ch. 22. 1 Atk. 13. 188. 2 Atk. 444. 477. Talb. 64. 2 Ves. 16. 305. Ambl. 121. Cowp. 432. and see post, chap. 9.

(z) And therefore personals which she has in autre droit, as executrix, or guardian in socage, &c. shall not go to the husband. Co. Lit. 351. (Though the husband and wife have a judgment for a debt due to the wife's testator. Jon. 248. Com. Dig. Bar. & Fem. E. 3.) Nor chattels of which she has a bare possession by bailment or trover. Co. Lit. 351. b.

(a) So, if they accrue *during* the coverture, the interest vests in the husband, though he has not possession of them before the death of his wife. (Com. Dig. Bar. & Fem. E. 3.) and where a wife, though trading separately, lent money to be laid out in a lottery ticket, in the property of which she was to share, and the ticket proved a prize, the husband was held entitled to the whole produce. 8 Ves. 599. *Lampher v. Creed*.

AMERICAN CASES.

(1) A marriage is an absolute gift to the husband of all the wife's personal chattels in possession, and also of *chores in action*, if he reduce them into possession by receiving them or by recovering them at law. *Legg v. Legg*. 8 Mass. Rep. 99.

A note given to a *feme covert*, though it be for a debt due to her while *sole*, is legally payable to the husband, and the property vests absolutely, and will not go to the wife on a dissolution of the marriage. *Shuttlesworth v. Noys et al.* 8 Mass. Rep. 229.

may make any disposition in his lifetime, without her consent; or may by will devise them; and they shall, without any such disposition, go to the executors or administrators of the husband, and not to the wife, though she survive him.(b) So personals that come into possession during coverture.(b)

If the husband,(c) or husband and wife,(d) make a letter of attorney to one to receive a debt,(e) or legacy(f) due to the wife, and he receives, but does not pay it to the husband, yet does it vest in the husbands possession.(1) And where an executor paid a legacy to a feme covert, who lived separate from her husband, yet on a bill brought by the husband against the executor, he was decreed to pay it over again with interest.(g) So, where a legacy was given to a feme covert to be paid

(b) Co. Lit. 351. b.

(c) 1 Roll. Abr. 342. Moor, 452.

(d) Moor, 452. 1 Roll. Ab. 342. Golds. 160.

(e) 1 Roll. Abr. 342. Golds. 160

(f) 1 Roll. Abr. 342. Golds. 160.

(g) Salk. 115. pl. 4. 1 Vern. 261. The husband may release a legacy left his wife, although they are divorced a mensa et toro. 1 Roll. Abr. 343. Cro. El. 908. Noy, 45. Moor, 665. 3 Bulstr. 264. Quære, If the separation

AMERICAN CASES.

But as to the power of the wife over her separate estate. Vide Jaques v. Meth. Epis. Church. 17 Johns. Rep. 548.

(1) As to the husbands interest in her distributive share of her fathers estate, vide Whitaker v. Whitaker, 6 Johns. Rep. 112.

twelve months after testator's death, and the wife died within the twelve month, the interest was vested in the husband, for he might release within the twelve months.(*h*)

And he may release costs which his wife recovers against a woman whom she has sued in the spiritual court, for adultery with her husband; for the marriage continues, and whatever accrues during coverture, belongs to him.(*i*) But if she be divorced a mensa is by agreement, and separate maintenance decreed in Chancery? in 9 Mod. 43. The husband, divorced a mensa et toro, was restrained by injunction from selling a term of his wife's. If after separation, she receive for a long time rent of land accruing to her by demise, she shall be presumed to do so, and to acknowledge the tenancy by her husband's authority. 1 Taunt. 367. Doe v. Biggs.

(*h*) 2 Roll. Abr. 134. Com. Dig. Bar. & Fem. E. 3. But where the husband dies without having made any disposition of a legacy left to the wife, it survives to her. 2 Com. Rep. 725. Brothero v. Hood; 2 Ves. 676. Garforth v. Bradley. The wife's distributive share of personal estate vests in her husband on the death of intestate. 2 Bro. Ch. Ca. 589. Robinson v. Taylor. 1 Anstr. 63. Sawyer v. White. But possession by the husband as executor and trustee is not such a reduction into possession of his wife's share in the residue, as will entitle him against her right by survivorship. 12 Ves. 497. Baker v. Hall, 16 Ves. 413. Wall v. Tomlinson. If the husband survive he has the legacy, though he dies before it is paid. 1 Atk. 458. Humfrey v. Buller.

(*i*) Salk. 115. pl. 4. Lord Raymond, 73. 5 Mod. 69. Where the husband, in consideration of receiving a portion of the fortune of a ward of Chancery, released all right and interest in the residue, he was not permitted to attend the master in taking an account directed against

et toro, and have her alimony, and sue for defamation, or other injury, and there recover costs, the husband cannot release them,(1) for these come in lieu of what she hath spent out of her alimony, which is a separate maintenance, not in the power of her husband.(k)

If husband alone,(l) or husband and wife, have a judgment for the debt of the wife, but delay execution, the debt is vested in the husband; and if he survives, he may take out execution, without a "Sci. Fa."(m) So if an award be made to pay to the husband, a debt due to the wife; though he die before payment.(n)

executors, on the suggestion that the valuation under which he received the portion of his wife's fortune, was not fair. 16 Ves. 48. *Pierce v. Crutchfield*.

(k) Roll. Rep. 426. 3 Bulstr. 264. 1 Roll. Abr. 343.

(l) 1 Vern. 396. but if the wife survives she shall have it, *ibid.* 3 Atk. 21. or the benefit of a decree in her right, 1 Ch. Ca. 27. *Hannev v. Martin*. It has been holden too, that stock survives to the wife. 9 Ves. 174. *Wildman v. Wildman*.

(m) 1 Mod. 179.

(n) 1 Vern. 396. and where the goods of a feme sole are in the possession of another by trover or bailment, and she marries, they so far vest in the husband, that he may

AMERICAN CASES.

(1) For any species of injury done to the wife, the husband may release the damages. *Southworth v. Packard*, 7Mass. Rep. 95.

And a judgment in an action by the husband, for an injury done to the wife, where the wife might have joined in the action will be a good bar to a joint action by the husband and wife for the same cause, *ibid.*

Chattels personal, of a mixt nature, partly in possession, and partly in action, the husband shall have if he survives, as an avoidance of a church which falls during the coverture ;(o) so arrearages of rent service, charge, or seck, which incur during the coverture,(p) or before it.(q)

And if the wife's portion be secured by settlement of land, and the husband makes a jointure for it, it shall be vested in the husband, although not paid.(r)

But the wife shall have, after the death of her husband, a necessary bed and apparel, agreeable to the quality of her husband ; and these, as paraphernalia, shall not go to the husband's executor, or be liable to his creditors.(s) Jewels to the value of 370*l.* have been allowed as paraphernalia.(t) However

sue for them alone, 1 Keb. 641. Moor, 25. pl. 85. 2 Lev. 107. Vent. 261.

(o) Co. Lit. 351.

(p) Ibid. But the wife has them if she survive. Com. Dig. Bar. and Fem. F. 1. and money in the hands of a trustee if the husband make no disposition of it, *ibid.* So the *residuum* of testator's estate, if bequeathed. 11 Vin. 377, pl. 8. Ca. Temp. Talb. 171. Fort v. Eort.

(q) 32 H. 8. c. 37.

(r) Com. Dig. Bar. and Fem. E. 3.

(s) 1 Roll. Abr. 911. or legatees, 3 Atk. 395. and if the husband pawn them, and leave sufficient estate, they shall be redeemed for the wife, *Id.* 394.

(t) Cro. Car. 343. 1 Roll. Abr. 911. being suitable to the wife's estate and degree,

these paraphernalia may be barred by articles before marriage. (u)

3. Choses in action, as debts due to the wife by obligation, &c. though they are likewise so far vested in the husband, (x) that he may reduce them into possession; yet, if he dies before any alteration made by him, (1) they

(u) 2 Atk. 642. and the husband may alien them during coverture. 3 Atk. 394. but he cannot bequeath them, 2 Atk. 77. Northey v. Northey. And in equity no paraphernalia are allowed where the husband dies indebted, though the court will let the wife in on other funds, if there are any. 2 Ves. 7. Lord Townsend v. Windham. 2 P. Wms. 179. 3 Br. Pl. 187. Parker v. Harvey.

(x) A note given to a feme covert vests in the husband, though she be a sole trader; and her endorsement, unless in his name, is void. 1 E. R. 432, 4. Barlow v. Bishop. But a bond belonging to the feme when sole, was not held to be reduced into possession by the husband's paying contribution money on it, under a bankruptcy, 2 Vern. 707. The husband may sue alone for the wife's choses in action; but if he joins her in the action, recovers judgment and dies, the judgment survives to her. 1 Vern. 396. Alleyn, 36. 2 Lev. 107. 2 Ves. 677. In 3 Atk. 21. Lord Hardwick is reported to say, that if the husband has recovered a judgment for the debt of the wife, and dies before execution, the surviving wife, and not the

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(1) *Choses in action* if they be not reduced into possession by the husband, during the coverture remain the property of the wife, on the dissolution of the marriage, either by the death of the husband, or by a divorce *a vinculo*. Legg v. Legg, 8 Mass. Rep. 99. Whitaker v. Whitaker, 6 Johns. Rep. 112.

shall go to his wife;(y) and they shall not, without such alteration, survive to the husband upon the death of the wife,(y) or he have any right to them as husband: But he is entitled as administrator to his wife,(1) and administration is of right to be granted to be granted to him.(z) And in equity, a set-

husband's executors, [is entitled. If husband and wife have a decree for money, and the husband dies, the decree survives to the wife. 1 Ch. Ca. 27. *Manners v. Martin.*

(y) Co. Lit. 351. 3 Mod. 186. But rent accrued before or during coverture, survives to him, and presentation to a church avoided during coverture, ante, sec. 2. A bond made in consideration of marriage, and conditioned for payment to the wife of so much money after the death of the obligor, is not released by marriage. 5 T. R. 381. *Milborn v. Ewart.*

(z) 1 Roll, Abr. 910. and in case of his death after the wife, to his next of kin (3 Atk. 526. 1 Ves. 15. 1 Wills. 168.) and if any other be appointed, he is a trustee for the representative of the husband (1 P. Wms. 378. 381.) The statute of distributions does not extend to the estates of *femes covert*. 29 Car. 2. c. 3. s. 25.

AMERICAN CASES.

(1) A husband who survives his wife is entitled to all her *choses in action*, whether reduced into his possession in her lifetime or not, if he can get them without a suit his title is as perfect as though he had taken out letters of administration; and if administration be obtained, by a third person, he is to be considered a mere trustee for the husband, during the husband's lifetime, and for the husband's representative, after his death. *Whitaker v. Whitaker.* 6 Johns. Rep. 112.

tlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in the wife's lifetime to the whole choses in action. But it has been said, that if not made in consideration of her fortune, the surviving wife will be entitled to the choses in action, the property of which has not been reduced into possession by the husband; so, if it is in consideration of part of her fortune, such of the choses in action as are not comprised in that part, it hath been said, survive to the wife. (a) In the case of *Blois v. the Countess of Hereford*, (b) a settlement was made for the benefit of the wife, but no mention made of her personal estate: Lord Keeper decreed, that it should belong to the representatives of the husband; and said, that in all cases where there is a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there be no agreement for that purpose. (c) But now, it seems, this extends only to the fortune she has at the time of the settlement, and not to future accessions, which survive to the wife, if they consist of terms for years or choses in action, and are not reduced into possession by the

(a) *Prec. Chan.* 63. *Cleland v. Cleland.* 2 *Vern.* 502. *Ca. Temp. Talb.* 168. *Adams v. Cole.*

(b) 2 *Vern.* 501.

(c) *Eq. Cas. Abr.* 69.

husband,(d) unless the settlement expressly gives them to him.(e)

Money, due upon mortgage, is considered as a chose in action, and subject to the disposal of the husband only, whether the mortgage be in fee, or for a term ;(f) for though, in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt.

In one case(g) it is ruled that a voluntary assignment by the husband, of the wife's choses in action, though void as between the husband and the assignee, will yet have the effect of altering the property, as between husband and wife. But it seems to be now settled,(h) that the husband's assignment in such case, must be for a valuable consideration.

A court of equity will not interrupt the *legal* title of the husband to the property of

(d) Per Master of the Rolls in *Mitford v. Mitford*. 9 Ves. 87. 10 Ves. 574. Any act of authority is a reduction into possession as release, assignment, and, of course, receipt.

(e) 9 Ves. 87. 11 Ves. 574. *Carr v. Taylor*. Amb. 692. *Salway v. Salway*.

(f) 1 P. Wms. 458. *Bosvil v. Brander*, 2 Atk. 208. *Bates v. Dandy*. Where a husband promised to assign his wife's mortgage, as a security for money borrowed on his note, it was held a disposition *pro tanto*. Ibid.

(g) 1 P. Wms 378. *Sqib v. Wym*.

(h) 2 Atk. 207. *Bates v. Dandy*, 417. *Jewson v. Moulson*, 1 Br. Ch. Rep. 44.

his wife, unless called upon *by him* to lend its assistance ; but if he ask for equity, he must do equity by providing for his wife.(i)

And volunteers and general assignees, (whether by operation of law or otherwise,) are subject to the same equity with respect to the wife's property, as the husband is.(k) However it does not seem to have been yet determined that a court of equity will interfere, and interrupt the legal right of such assignees, any more than that of the husband, where they can get possession of the wife's property without the aid of the court.(l) But where the property is the subject of equitable jurisdiction, and they are obliged to go into equity for the recovery of it, there the court will oblige them previously to make a provision for the wife.(m) And as against a *particular* assignee of a chose in action, of the wife for a *valuable consideration*, such equity it now seems will be supported as much as against general assignees.(n)

(i) 2 P. Wms. 639. Milner v. Colmer, 2 Ves. 669. 2 Atk. 420. 5 Ves. 515.

(k) 1 P. Wms. 251. 2 Atk. 420. 1 P. Wms. 382. 4 Br. Ch. Rep. 139. See further on this head, post, chap. v.

(l) Bunb. 86. Winch v. Page, 1 Str. 248. Gardner v. Walker, 503. 2 Atk. 420.

(m) 1 P. Wms. 382. Jacobson v. Williams, 251.

(n) Macauley v. Phillips, 4 Ves. 17. Id. 528. Franco v. Franco. Like v. Beresford, 3 Ves. 506. 1 Vern. 18. Pitt v. Hunt, 1 P. Wms. 439. (Cox's) Worrall v. Marlar, 2 Vern. 270. Tudor v. Savigne, Pr. Ch. 412. Packer v.

The interest of the wife's separate property is always payable to the husband, (o) if he maintains the wife. But where he receives a great part of her fortune, and will not settle the rest, a court of equity will not only stop the payment of the residue of her fortune, but will even prevent him from receiving the interest of the residue, that it may accumulate for her benefit. (p) If the trustees once pay the wife's separate fortune to the husband, it is irrevocable. (q)

Whatever the wife during coverture earns by her labour, is solely the husband's. "Indebitatus assumpsit," was brought by husband and wife, in which they declared that the defendant was indebted to them for perriwig-maker's work done by the wife, *ad damnum ipsorum*;" and on demurrer judgment was

Wyndham, 1 Eq. Ca. Abr. 58. Walter v. Saunders, 4 Br. Ch. Rep. 326. Pope v. Crashaw, 2 Atk. 417. 207. In these cases of *particular assignments*, a distinction has between a *trust term* and chose in action of the wife. Cox's note in 1 P. Wms. 459. and it seems that a trust term may perhaps be exempt from the wife's equity, because it may be taken at law under a *Fi. Fa.* 4 Ves. 19. 528. 2 Vern. 270.

(o) 2 Ves. 561. and his executors are not accountable for interest, though assets are liable for principal sums received by him under his wife's permission, where her separate personal estate was vested in trustees, 2 P. W. 82. Powell v. Hankey.

(p) 3 Atk. 21. 4 Ves. 15. 11 Ves. 12. Wright v. Morley.

(q) Pr. Chan. 414. Squire v. Dean, 4 Br. Ch. Rep. 326.

given against the plaintiff: (r) for this being a general "indebitatus assumpsit" implied by law, the law will not imply any promise made to the wife, for she is as servant to the husband, who is at all the charges in furnishing hair, &c. ; and therefore the law implies that the promise was made to him only, and that he alone ought to have sued. But if a special assumpsit had been brought by both, on an express promise to the wife, it had been good. (s)

(r) Salk. 114. pl. 2. Carth. 251. 4 Mod. 156. Buckley and ux. v. Collier.

(s) Cro. Eliz. 61. 96. Cro. Car. 439.

CHAP. III.

1. *How far Acts of the Husband in respect of his Wife's Freehold are binding on her.* 2. *What Acts of Wife are binding.* 3. *What voidable.* 4. *What void.* 5. *What Acts and Agreements before Marriage are revoked and avoided by the Marriage.* 6. *Of Evidence in Cases of Coverture.*

AT common law, any alienation made by the husband of his wife's land, whether by feoffment, fine, or recovery, was a discontinuance, by which, after his death, she was disabled from entering, and was put to her "cui in vita" to reinstate herself. But the 32d H. 8. c. 28. it is provided, that no fine levied by the husband alone (or feoffment, or other act,) of lands being the freehold and inheritance of the wife, shall in anywise be, or make a discontinuance, or be otherwise prejudicial to her or her heirs; but that the wife and her heirs shall and may lawfully enter into the said lands, according to their rights and titles therein: and the statute extends to lands which the husband has jointly with his wife, (a) or with her, and to the heirs of their bodies. (b)

(a) Co. Lit. 326. 2 Inst. 681. 8 Rep. 72.

(b) 2 Inst. 681. 9 Rep. 138. Cro. Car. 477. And the wife, if entitled to reversion or remainder in tail expectant on an estate tail in the husband, may enter after his feoffment or fine, but not after his recovery. Co. Lit. 326. a. 8 Rep. 72. b. Touchst. 46.

So that such fine, feoffment, &c. is binding on the wife, only during the coverture (c) However, if the husband and wife are jointly seized in tail, and the husband alone makes a feoffment, &c. and his wife dies before him, the issue shall not enter during the life of the husband; (d) nor, if the husband was seized in right of his wife, and had issue. (e) And if the wife neglect to enter within five years after the death of her husband, and the fine was with proclamation, her entry is taken away, and her right for ever extinguished. (f) So, if she herself levy a fine before entry, her entry, is barred. (g)

And if the wife die without an heir, after a

(c) Com. Dig. Bar. and Fem. K. A feoffment by husband and wife is a discontinuance for though the wife joins, it is the act of the husband alone, Co. Lit. 326. that a recovery by the husband is void, see F. N. B. 468. 2 Inst. 343. Plowd. 57. Booth, 185. A parcener may, after her husband's death, avoid by entry, unequal partition made by her husband and herself. Lit. Sec. 256.

(d) Co. Lit. 326. Hob. 261. If there be a divorce a vinculo matrimonii after the discontinuance, the wife may enter immediately. 8 Rep. 73. a. Grenely's case.

(e) Co. Lit. 326.

(f) Ibid. Dy. 72. 162. Plow. 373. 8 Rep. 72. Where the wife refuses to levy a fine, equity will not enforce the husband's covenant that she shall levy it, but order the purchase-money to be refunded with costs. 4 Vln. Abr. 203. pl. 4. Ooutram v. Round, 8 Ves. 515. See Lord Chancellor's argument. But see 3 P. W. 189. Hall v. Hardy.

(g) 2 Roll. Rep. 311. Cro. Car. 320.

discontinuance by her husband, entry is not given to the lord by escheat.(h)

By the statute 32 H. 8. c. 28. the wife must be made party to any lease by a husband of the inheritance of his wife ; such lease must be by indenture, in the name of the husband and wife, and sealed by the wife ; the rent reserved to husband and wife, and the heirs of the wife according to her estate in the same—and must be the most accustomed rent paid for the same lands within twenty years next before the lease—the lease not to exceed twenty-one years, or three lives, from the day of making ; nor to commence till the expiration, or within one year thereof, of any former lease of the same land. Nor is the lease to be granted without impeachment of waste. The statute does not extend to a grant of any reversion ; nor to leases of land not most commonly letten for twenty years next before such lease.

It was always held necessary, as well before as since the statute of 32 H. 8. c. 28., that a lease by husband and wife should be by *deed* ; for if it be not the lease is void, and cannot be affirmed by acceptance of rent by the wife after the husband's decease ; and the reason is, because her assent is necessary at

(h) Hob. 261. Copyhold lands are not within the letter or equity of the statute, because the husband cannot discontinue the wife's estate by surrender ; for nothing passes by the surrender but what the surrenderer may lawfully part with. Gilb. Ten. 177. 189. Moor, 596. 1 Roll. Abr. 632. pl. 25. 4 Rep. 23.

the commencement of the lease, and that can only be given by deed.(i) Still however, if the lessee or any other *plead* a demise by husband and wife, it is not necessary to *plead* it, to be by deed.(k) And a lease by husband and wife of the wife's lands, not pursuant to the statute, is a good lease during the coverture, and may be pleaded as *their* lease,(l) though it be without any reservation of rent; for the lease is not void, because the wife, after her husband's death, may affirm it by an action of waste, or accepting fealty,(m) and where rent is reserved, by acceptance of rent;(n) or disagree and avoid it by an ejectment or action of trespass.(o) If she accepts rent after the husband's death, she is liable to the *covenants* in the lease: and if a lease be made to a husband and wife by indenture, and she agrees after the husband's death, she is liable to all the covenants contained in the lease, except such collateral covenants, (as the payment of a sum in gross, &c.) which charge the person and not the land.(p) If the husband *alone* makes a lease for life of his wife's land, it seems to be only voidable, and that the wife must *enter* after his death to

(i) Dy. 91. b.

(k) 2 Rep. 61. b. Wiscot's case.

(l) Ibid.

(m) Hatt. 102.

(n) 1 Roll. Abr. 349. Y. pl. 2. 7 T. R. 478. Doe v. Weller.

(o) 3 Rep. 27. b. 28. a. Cro. Jac. 563.

(p) Bro. Covenant, 6. Coverture, 11. Cro. Jac. 563.

avoid it; but if he alone makes an estate for years, it is absolutely void, and determined by his death, and therefore cannot be affirmed by acceptance of rent after. 2 Wms. Saund. 181. a. The reason of this distinction Serjeant Williams lays down, because the lease for life commences by livery. However, unless the estate for life were granted by feoffment, it does not commence by a more commonious livery, than a term for years under an indenture; so that the reason advanced, unless applied to a mere parol lease, fails. And in 3 Bacon's Abridgment, 305, it is said to be clearly agreed in all the books, that if the husband *alone* makes a lease of his wife's lands for years, by indenture, reserving rent, it is a good lease for the whole term, unless the wife by some act shews a dissent to it; and if she accepts rent which accrues after the husband's death, the lease is thereby become absolute and unavoidable. However, none of the authorities cited bear out this position, and the matter is perhaps still doubtful. (q)

Husband and wife made a lease not pursuant to the statute, the lessee enters, and the husband, before any day of payment, dies; the wife takes a second husband, who at the day accepts rent and dies: it was holden that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoidance to her husband, and his acceptance of the rent binds her. (r)

(q) 2 Wms. Saund. 181. a.

(r) Dy. 159. 1 Roll. Abr. 475. 1 Roll. Rep. 132. Dyer adds a quære, for Broke disagreed. If there be an ex-

The husband, seized of copyhold lands in right of his wife in fee, makes a lease thereof for years, not warranted by the custom, which is a forfeiture of her estate ; yet this shall not bind the wife or her heirs after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture ;(s) and the diversity seems between this act, which is at an end when the lease is expired, or defeated by the entry of the lord, or the wife after the husband's death, and such acts as are a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor ; so of non-payment of rent, denial of suit, or service ; for such forfeitures as these bind the inheritance of the wife after the husband's death ; but in the other case the husband cannot forfeit more than he can grant, which is but for his life.

A woman guardian in socage marries, and joins with her husband in making by indenture a lease for years of the ward's lands, yet after her husband's death she may avoid the same ;(t) for though the wardship of the body press condition annexed to the estate of a woman who marries, the laches of the husband to perform the condition loses the estate for ever. Co. Lit. 246. b. So the laches of the husband to perform a condition in law which requires skill—as where a woman has the office of Parker, &c. Co. Lit. 233.

(s) 2 Roll. Rep. 344. 361. 372. Cro. Car. 7. Cro. El. 149. 4 Rep. 29.

(t) Plow. 293. Co. Lit. 351. 1 Roll. Abr. 345,

and land is in this case but a chattel, yet the wife being possessed of it for the benefit of the infant, the husband's disposition shall not bind her after his death, but that she may avoid in right of the infant, whose guardian she still continues to be; and her own joining⁽¹⁾ in the lease was not material, because she was then under coverture.

2. It has long been settled that a married woman may execute a power, whether appendant, in gross, or simply collateral.^(u) Thus, if a married woman is tenant for life, with a power of leasing in possession, she cannot raise a mortgage term for instance, without a fine or recovery; but by the mere execution of her power she may create a lease, which will at least in part, and may perhaps wholly, take effect out of her interest.

It is not material, whether the power is given to an unmarried woman who afterwards marries,^(x) or to a married woman who afterwards takes another husband;^(y) but a power given expressly to a woman *being sole*, cannot be executed during coverture,^(z) though

^(u) Harris v. Graham, 1 Roll. Abr. 329. pl. 12. 1 P. Wms. 149. Travel v. Travel, 3 Atk. 711, 2 Ves. 191, cited.

^(x) Finch., 346. Gibbons v. Moultau.

^(y) 2 Com. 494. Bayley v. Warberton, 1 Ves. 157. Burnett v. Mann.

^(z) 1 Ch. Ca. 17. Lord Antrim v. Duke of Buckingham.

AMERICAN CASES.

(1) Vide Byrne and wife v. Hoeson, 5 Johns. Rep. 67.

it is clearly settled that a feme covert may execute a power given her whilst sole. And the heir-at-law of a woman is bound in equity by a mere agreement entered into before marriage, between her and her husband, that she might dispose of her estate during coverture.^(a) But where the agreement is, that the *wife* may dispose of the estate by will, a will made before marriage,⁽¹⁾ though subsequent to the agreement, will be revoked by the marriage.^(b)

If the wife join the husband in a fine to convey her own inheritance, it ought to be received, if, upon her examination, it appears to be voluntary and free from constraint; and if she be of full age, the fine shall bind her as if she had been sole.^(c)

But the books which say that a fine shall not bind a woman under coverture, unless she be examined, must not be construed as if it were in her power to reverse the fine for want of her examination; they are to be understood in this sense, that the judge ought

(a) Ambl. 468. Wright v. Englefield, 565. Rippon v. Dawding.

(b) 2 Br. C. C. Hods. dem. v. Loyd, 2 T. R. 697. Doe v. Staple.

(c) 18 E. 4. 12. 1 Roll. Abr. 347. 2 Roll. Abr. 20. 2 Inst. 515.

AMERICAN CASES.

(1) In Massachusetts a marriage without issue is not, as to the wife, a revocation of a will made before marriage. Church v. Crocker. 3 Mass. Rep. 21.

not to receive a fine without examining her.(d) However the examination of a feme covert is not always necessary in levying fines, because that being provided, that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when husband and wife take an estate by the fine and part with nothing, the feme need not be examined: but where she is to convey or pass any estate or interest, either by herself, or jointly with her husband, there she ought to be examined; therefore if A. levies a fine "come ceo" to baron and feme, and they render to the conusor, the feme shall be examined: so it is where she takes an estate by the fine, rendering rent.(e)

If a man makes a jointure on his wife, either before or after marriage, and they both join in a fine, she is bound thereby;(f) and if the jointure was made before marriage, she is barred to claim dower in any other lands of the husband's. But if the jointure was made during coverture, she may claim dower in the other lands.(1)

(d) 2 Inst. 515.

(e) 2 Inst. 515. 2 Roll. Abr. 17.

(f) Co. Lit. 36. Dy. 358.

AMERICAN CASES.

(1) A wife may bar herself of dower in her husband's lands by executing a deed with her husband, expressly relinquishing therein all claim to dower in the premises sold. *Lithgow v. Kavanagh*. 9 Mass. Rep. 161. *Caslin v. Ware*. 4 Mass. Rep. 218.

If baron and feme, by fine "sur concessit," grant lands to J. S. for 99 years, and warrant the said land, during the said term, and the baron dies, and J. S. is evicted by one that hath a prior title, he may thereupon bring covenant against the feme, notwithstanding she was covert, at the time that the fine was levied.(g)

If a feme covert join with her husband in levying a fine to raise a sum of money by way of mortgage, this shall bind her.(h) And it has been holden that a mortgage for years, by husband and wife, of the wife's inheritance without any fine levied, may be confirmed by circumstances, by the wife when discovered, although there be no actual re-delivery of the deed.(i)

A recovery, as well as a fine by husband and wife, is binding.(k) And a demise for life, or years, of the wife's land made by hus-

(g) 2 Saund. 177. 1 Sid. 466. 1 Mod. 290. 2 Keb. 684. 703. Wotton v. Hale.

(h) Bac. Abr. Bar. and Fem. I. Ca. Temp. Talb. 41. Penne v. Peacock. Where the money shall be paid out of the personal estate of the husband see 1 Vern. 213. Brend v. Brend, post, chap. v. sec. 2. C. Where husband and wife mortgaged, and answered jointly on a bill to foreclose; the joint answer was held equal to a fine, and the mortgage good, Mos. 248. and see Bunb. 162. Roupe v. Atkinson.

(i) Cowp. 201. Goodright v. Strahan; but see 2 P. Wms. 126. Drybutter v. Bartholomew, post, chap. v. s. 2. C.

(k) 10 Rep. 43. 2 Roll. Abr. 395.

band and wife pursuant to the statute 32 H. 8. c. 28.(l) is binding; though the wife be an infant;(m) for the statute only says, "if any of full age seised in right of his wife."

A wife, we have seen, may, without her husband, execute a naked authority, whether given before or after marriage.(n) So, where both interest and authority pass to the wife, if the authority be collateral to and do not flow out of the interest;(o) because then the two are as unconnected as if they were vested in different persons. And as a feme covert may, without her husband, convey lands in mere execution of an authority or power; so she may in performance of a condition, as where land is vested in her on condition to convey to others.(p) It is doubtful, however, whether she can convey lands as trustee, without her husband joining in the conveyance.(q)

The receipt of money by the feme, will be binding on the husband, if it appears that she *usually*(1) receives and pays for him.(r)

(l) Ante, sec. 1. But a joint demise is disproved by evidence of a receipt for rent given by husband only. 2 Taunt. 180. Parry v. Hindle.

(m) 3 Leon. 133.

(n) Hargr. Co. Lit. 112. a note 6.

(o) 2 Ves. 191. Peacock v. Monk.

(p) Sir W. Jon. 137.

(q) Co. Lit. 112. a. note 6.

(r) 2 Freem. 178. Seaborn v. Blackston.

AMERICAN CASES.

(1) Vide Fenner v. Lewis. 10 Johns. Rep. 38.

It has been thought that a woman cannot, without the consent of her husband, take upon herself the execution of a will (1) However, there is no instance of a prohibition being in such case granted to restrain the proceedings in the spiritual court; but she cannot, without her husband joining, release the testator's debts, for that might go to charge the husband. The husband may obtain probate for his wife, without her consent; but she will not in such case be liable to a devastavit.(s)

3. But if husband and wife levy a fine, and the wife is within age, they may join on a writ of error to reverse it during the minority of the wife, not by any privilege of coverture, but because the act was voidable by reason of infancy.(t)

And if a feme covert levies a fine of her own inheritance without her husband, though this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record; yet may the husband enter and avoid it, either to restore him to the freehold he held "jure uxoris," or after her death to restore himself to his tenancy by the

(s) Fonbl. Eq. T. 93.

(t) F. N. B. 31. 1 Leon. 15. 3 Lev. 36.

AMERICAN CASES

(1) Where a *feme sole* who is appointed sole executrix or administratrix marries, the husband become joined in such trust with her. *Barber and ux. v. Bush.* 7 Mass. Rep. 516.

curtesy ; because no act of a feme covert can transfer the interest which the intermarriage hath vested in the husband ;(2) and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it(u)

If a feme covert, as sole, levies a fine executory, and execution is sued against the husband and wife, he may stop the execution, because no act of her's can prejudice him ; and if in this case the husband makes default, and she is received, she may, for the benefit of her husband, disturb the execution of her

(u) Bro. Fines. 33. Co. Lit. 46. 7 Rep. 8. 10 Rep. 43. Hob. 225. Where the husband covenanted that his wife, then a minor, should, when she came of age, levy a fine, which she afterwards consented to do, but the husband was absent ; she was only allowed to acknowledge it " de bene esse," 2 Bl. Rep. 1205. Moreau's case. And where a woman lived separate from her husband, under articles, by which it was agreed, that she should enjoy to her own use such estates as should come to her during coverture, and that the husband " would join to such uses as she should appoint," the court of C. P. held she might surrender copyholds, *without her husband joining*, and without a special custom for that purpose, 1 H. B. 334. Compton v. Collinson.

AMERICAN CASES.

{2} At common-law the deed of a married woman is not merely voidable but void and she may plead generally *non est factum*. Fowler v. Shearer. 7 Mass. Rep. 4.

But as to the cases where she may bind herself by deed, Vide Jackson v. Metli. Epis. Church. 17 Johns. Rep. 548. Osgood v. Breed. 12 Mass. Rep. 525. Colcord v. Swan. 7 Mass. Rep. 291.

own fine; but after the death of her husband she cannot avoid it.(x) An entry of the husband into part of the land whereof the wife alone levied a fine, will avoid the whole fine.(y)(1)

A bargain and sale by husband and wife, of the wife's lands, by deed indented and enrolled, is voidable by the wife; for a wife cannot be examined by any court, without writ, and there is no writ allowed in this case;(z) and no act is binding on her, in which she has joined her husband, without such examination.(a)

A feme covert is capable of purchasing;(b) for such an act not being necessarily disadvantageous to the husband, he is supposed to assent to it, as being for his advantage; but

(x) Bro. Tit. Fine, 79.

(y) 1 Freem. 396. Mayo v. Combes.

(z) 2 Inst. 673.

(a) 2 Atk. 180. Grosvenor v. Lane, where a woman joined her husband in assigning a legacy in trust for her daughter; but was held entitled to it after her husband's death; 2 Ves. jun. 673. Wright v. Butler, where she joined her husband in assigning a bequest of her own to him.

(b) Co. Lit. 3. And a bond to her singly is good, Bro. Obligation, pl. 36.

AMERICAN CASES.

(1) Vide Dudley v. Sumner, 5 Mass. Rep. 463. Colcord et al v. Swan et ux. 7 Mass. Rep. 291. Lithgow v. Kayenagh, 9 Mass. Rep. 161. Catlin v. Ware, 9 Mass. Rep. 218.

he may disagree and avoid the purchase, and if he pleases bring trover for the recovery of the purchase-money.(c) However, if he neither agrees nor disagrees, the purchase is good; for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage. But in this case, though the husband should agree to the purchase, yet may the wife after his death waive it; for having no will of her own at the time of the purchase,(1) she is not indispensably bound by the contract; therefore if she does not, when under her own management and will, by some act express her agreement to such purchase, her heirs shall have the privilege of departing from it.

4. A feme covert, in consequence of the sole authority vested in her husband, having no power to make a contract,(2) her contracts

(c) 1 *Ld. Raym. Garbrand v. Allan*. The like remedy for money lost by the feme at cards, 1 *Sid. 112. Rey. v. Stephens*.

AMERICAN CASES.

(1) A deed executed by a feme covert is not binding upon her untill acknowledged, and her subsequent acknowledgement does not relate back to the time of its execution. *Jackson v. Stevens*, 16 *Johns. Rep. 110*. Vide *Jackson v. Cary*, 16 *Johns. Rep. 302*. The wife is not bound by covenants in a deed which she has signed with her husband. *Whitbeck v. Cook and wife*, 15 *Johns. Rep. 483*.

(2) Vide *Edwards v. Davis*, 16 *Johns. Rep. 281*. *John v. Parmeley*, 17 *Johns. Rep. 271*.

are absolutely void ;(d) and if she sell or dispose of the money or goods of her husband, without his consent, the sale is void, and the husband may have trover, &c.(e) Even if a note be made payable to a feme sole or order,(1) and she afterwards marry,(f) she cannot during the coverture indorse it,(g) without authority from her husband: nor (a) where it is

(d) R. by all the judges, 1 Sid. 120. and therefore she cannot be sued when a widow, on a promissory note by her during coverture, 1 Str. 94. *Loyd v. Lee*. She can do no act to estop herself. Per Ld. Kenyon, 7 T. R. 539. If she borrow money and it is expended in necessaries, equity will put the lender in the place of the tradesman, (Pr. in Ch. 302. *Harris v. Lee*.) though at law the husband is not bound, 1 P. Wms. 463. S. C.

(e) Com. Dig. Bar. & Fem. Q.

(f) Where the maker promised payment to the indorsee, after the note was due, the husband's authority for the wife's indorsement was presumed, 1 Campb. 485. Quere, whether the declaration should state the indorsement as made by such authority.

(g) 3 Wils. 5. *Conner v. Martin*. Or without the consent of her husband discharge an obligor from the payment of an annuity due to her, on his bond, 3 E. R. 331. *Brown v. Benson*.

AMERICAN CASES.

(1) Because marriage is a gift to the husband of the wife's choses in action. Vide *Legg v. Legg*. 7 Mass. Rep. 99. *Whitaker, v. Whitaker*. 6 Johns. Rep. 112.

(2) A note given to a *feme covert* is legally payable to the husband, and the property vests absolutely in him. *Shuttlesworth v. Noyes and trustee*. 3 Mass. Rep. 229.

the case cited, the surrender was made during widowhood, before a second marriage; the will was made to declare the uses of the surrender; and by her husband's agreement.(m)

5. A warrant of attorney to confess a judgment, given by a feme sole, is revoked by marriage;(n) but a warrant of attorney given to confess judgment to a feme sole, is not countermanded; because for the husband's advantage.(o) Neither is marriage a revoca-

(m) Ambl. 627- George ex. dem. Thornberry v. —. Nor can she change the nature of her estate by articles, 2 Atk. 452. Oldham v. Hughes. By her husband's licence she may make a will; but unless it be given to the particular will in question, it will not be a complete testament, 2 Bl. Comm. 497. The husband on marriage frequently covenants to give such license and a woman may dispose by will, or do other acts in respect of her separate property, for as to that she is considered a feme sole in equity; she may also make a will of goods which she has in *acre droit*. The queen consort too may dispose of her chattels by will, *id.* 498, may grant and take, sue and be sued, without her husband, Co. Lit. 133. b.

(n) Salk. 117. pl. 19. A commission of bankruptcy cannot be supported against a feme covert, upon acts of trading and bankruptcy before marriage, 2 Br. Ch. Ca. 286.

(o) Ibid.

AMERICAN CASES.

She cannot, however, devise her lands, even with her husband's assent so as to bar her heir. Ibid.

A will executed by a feme covert devising real estate is void. Fitch v. Brainerd. 2 Days Rep. 163.

tion of a lease at will granted or accepted by a feme sole ; nor can she without the consent of her husband determine the lease in either case. (p)

But if a feme sole makes her will, and devises her land to J. S. and after marries him, and then dies, yet J. S. takes nothing by the will, because the marriage was a revocation of it ; (q) for as the law will not allow a woman under coverture to make a will, lest she should be influenced by her husband in the disposition of her estate ; so for the same reason a will made by a feme sole is revoked by the marriage, (r) lest she should be influenced by her husband (if it continued after the coverture) to revoke it or let it stand, as best answered his interest. It is in fact so totally revoked, that it will not revive in the event of her surviving her husband. (s) And where the intended husband agrees to give his wife power of making a will *after* marriage, and she makes one *before*, the marriage will revoke it. (s)

(p) 5 Rep. 10. Henstead's case, Kelw. 162. Co. Lit. 55. Cro. Car. 304.

(q) 4 Rep. 60. Forse v. Hembling. Colter v. Layer. 2 P. Wms. 624.

(r) 4 Burn's E. L. Mrs. Lewis's case.

(s) 2 Br. Ch. Rep. 534. Hodsden v. Loyd, 2 T. R. 684. Prohibition lies to the spiritual court if a suit be in-

AMERICAN CASES.

(1) But in Massachusetts this is otherwise provided by statute of 1783, c. 24, Church v. Crocker, 3 Mass. Rep. 21. Vide also Osgood v. Breed, 12 Mass. Rep. 525.

A surrender of a copyhold estate by a feme sole to the use of her will, if not rendered absolutely void, is at least suspended by a subsequent marriage; and in either case its operation is prevented. (1)

If A. on the one part, and B. and C. a feme sole on the other part, submit themselves to the award of J. N., and afterwards takes J. S. to husband, and the arbitrator, before any notice of the marriage, makes an award that B. and C. shall pay 30*l.* to A., yet this shall not bind J. S. (1) and C. his wife, nor B.; for the submission, by the marriage of C., is revoked as to B. also, and this without any notice. (2)

Also, equity will set aside the intended wife's contracts, though legally executed, when they appear to have been entered into with an intent to deceive and cheat the husband, and are in derogation of the rights of marriage; as where a widow makes a deed of settlement

stituted to obtain a *general* probate of a will made by a feme during coverture, though with her husband's assent, and though she survived him; for he could not enable her to dispose, during coverture, of property he might acquire after death, 5 E. R. 552. *Scammell v. Wilkinson*. But she may make a will of property which she has in *autre droit*, *ibid.*

(1) *Ambl.* 627. *George v. ———*.

(2) 1 *Roll. Abr.* 332. *White and Giffard*.

AMERICAN CASES.

(1) And if a feme sole marries after a report made by referees in her favour, the husband must be made a party by *scire facias* to the judgment. 11 *Johns. Rep.* 271.

of her estate, and married a second husband who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent.(x) So, where the intended wife, the day before her marriage, entered privately into a recognizance to her brother; and it was decreed to be delivered up.(y)

But where a widow, before her marriage with a second husband, assigned over the greater part of her estate to trustees in trust for children by her former husband, the court thought that a widow might provide for her children.(z)

And after some doubts on the subject, it is now determined, that bond given by intend-

(x) 2 Chas. Rep. 81. 79. 41. 2 Vern. 17. 2 Freem. 29. 2 P. Wms. 533, 553. 674. 2 Ves. 264.

(y) 2 Ch. Rep. 41. *Lance v. Norman*, 2 Br. Ch. Rep. 345. Fonbl. notes on Eq. Tr. 98, 99.

(z) 1 Vern. 408. *Hunt v. Matthews*, 1 Atk. 265. *Newstead v. Searles*, Cowp. 711. *Doe v. Routledge*. A widow previous to her marriage with G. conveyed her estate to trustees, to pay the rents to such uses as she, whether covert or sole, should appoint. She afterwards married B.; the deed was held valid against B., and a deed revoking it, obtained by duress, set aside, 2 Br. Ch. Ca. 345. *Lady Strathmore v. Bowes*, 3 Ves. 28.

Mr. Fonblanque observes, that this latter case is not immediately reconcilable with any of the preceding authorities on the same subject; but that this may be attributable to the peculiarity of the circumstances.

ed husband, (in consideration of marriage) to a feme sole, and conditioned for the payment of money to her after her husband's death, is not released or extinguished by the marriage. (a)

6. The general rule of evidence in cases of coverture, is, that the husband or wife cannot be admitted as evidence (1) for against

(a) 5 T. R. 381. *Milborn v. Ewart*. In equity a wife may sue her husband on his bond; or at least it will there be sustained as evidence of an agreement, 2 P. Wms. 243. *Cannel v. Buckle*.

AMERICAN CASES.

(1) But the wife has been admitted to prove her husband's performance of the articles of a separate agreement. *Fenner v. Lewis*. 10 Johns. Rep. 38.

And in Connecticut a wife may be a witness for her husband in an action of book debt, especially after his death. *Staunton v. Wilson*. 3 Days. Rep. 37.

Whether a *feme covert* is a good witness to support the title of a grantee from her husband when her right of dower has not been released. *Sweetser v. Meese*. 6 Binney's Rep. 500.

A husband cannot be a witness where in conveyance of his testimony, his wife may derive a benefit after his death. *Lessee of Sugden v. Sugden*. 6 Binney, 483.

Parol declarations of the wife that she executed a conveyance of her estate voluntarily, and that if it were insufficient she would execute it again are inadmissible to supply a defective acknowledgment. 1 Binney's Reports, 470.

A *feme covert* who had executed a deed with her husband, was held a competent witness to prove the deed antedated. *Jackson v. Bard*. 4 Johns. Rep. 230.

each other ;(b) and this rule seems grounded as well on the interest of the parties being the same, as on the political inconvenience of causing dissensions between husband and wife. Neither in a civil action, nor in a criminal prosecution,(c) are they permitted to give any evidence, which in its future effects may have the least tendency to criminate each other: and this rule is so inviolable that no consent will authorize the breach of it.(d)

But it has been said, the allegiance due to the crown is paramount to every private consideration, and that high treason is an exception to the rule above laid down ;(e) (even this however has been doubted.) And where the husband has committed personal violence on the wife, she may, from the necessity of the case, be examined as a witness against him.(f)

(b) 4 T. R. 578. *Davies v. Dinwoody*, Bul. N. P. 286. Nor for any person whose interest is the same: as where two are indicted for an assault, the wife of one cannot be examined for the other, 2 Str. 1095. *Rex v. Frederic and Stracy*.

(c) 2 T. R. 263. *The King v. the Inhabitants of Cliveger*. *Bentley v. Cook*, cited.

(d) Cas. Temp. Hard. 264. *Barker v. Sir Woolston Dixce*.

(e) 1 Brownl. 47. 2 Keb. 403. 1 Hal. P. C. 301. Hawk. P. C. lib. 2. c. 46. s. 16.

(f) 1 State Tr. 265. 269. Hutt. 115. 1 Str. 633. *Rex v. Azire*. In an action too, between other parties, the wife may be a witness to charge her husband; as, to prove the goods for which the action is brought, sold on

It is clear that a woman who never was legally the wife of a man, though in fact married to him, may be a witness against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* a wife. (g). But a woman once legally married, though afterwards divorced "a vinculo matrimonii," cannot be called as a witness to prove any fact which happened during coverture. (h)

On a plea of coverture, or in giving it in evidence on non est factum, an examined copy of the registry of the marriage should be produced, or the evidence of some person present at the marriage, proof of the wife's identity, and that her husband was living at the time the debt was contracted. In one case, where a woman was married in France, and

the credit of her husband; so perhaps in some cases in an action against her husband, though she will not be admitted as a witness; yet a confession of hers may be brought in evidence to charge him, as concerning an agreement about the nursing his child; and though the general disqualification of the wife applies to proceedings in equity against husband and wife, yet it does not apply to suits which they may institute against each other. 2 Fonbl. Eq. Tr. 456. note f.

(g) Bull. N. P. 287. Hawk. lib. 2. c. 46. s. 16. 1 Hal. P. C. 693.

(h) Munroe v. Twisleton, C. P. Sittings at Guildhall after Mich. Term, 43 Geo. 3.

AMERICAN CASES.

(1) Vide State v. J. N. B. 1 Tyler's Rep. 36.

the troubles in that country rendered it almost impossible to procure any witness who was present at the marriage, Lord Kenyon held, that proof of her having been received as a wife by her husband's relations here, was sufficient to support the plea of coverture. (d)

(c) 1 Esp. 353. *Leader v. Barry*.

CHAP. IV.

1. *Of Actions by, and against, Husband, and Wife.* 3. *In what Cases she is to be considered a Feme Sole, civilly; 4. criminally.*

Where they must join.

1. **I**N real actions for the recovery of the wife's lands; (a) in actions of waste, for waste committed on her land; (b) in detinue of charters of her inheritance, (c) the husband and wife must join (1)

In actions for the recovery of choses in action, (2) as a debt due to the wife *dum sola*,

(a) 1 Bulstr. 21.

(b) 7 H. 4. 15. a. 3 H. 6. 53.

(c) 1 Roll. Abr. 347. R. pl. 1. or in trover for a deed granting her a rent charge, and granted *dum sola*, though it came to the hands of defendant after coverture, Noy, 70. for rent due to her before coverture, as tenant in dower, 1 Roll. Abr. 348. Qu. If since 32 H. 8. c. 37. any difference between such rent due before and after marriage?

AMERICAN CASES.

(1) The husband of a *feme covert* guardian in socage, must join with the wife in suits by her. Byrne and wife v. Van Hoeson, 5 Johns. Rep. 67.

Vide Decker v. Livingston, 15 Johns. Rep. 479.

(2) The non-joinder of the wife in an action brought for the recovery of a debt contracted by her *dum sola* is a

the safer opinion seems to be that the husband and wife must join ;(d) and it seems that the husband's executors would gain nothing by the husband's suing alone ; for, in 3 Atk. 21. Lord Hardwicke says, that if the husband recovers judgment and dies, the judgment survives to the wife,—the husband and wife must join in an action brought for a personal wrong to the wife, and the declaration ought to conclude “to their damage,”(e) and not to the damage of the husband ;(f) for the damages will survive to the

(d) Moor, 422. Fenner v. Plasket, 1 Roll. Abr. 347. R. pl. 3. 2 Ves. 676, 7. Garforth v. Bradley, Buller's N. P. 179. (a debt due in right of the wife no set off for the husband) 3 T. R. 631. Milner v. Milner, where it was also decided, that if the wife sue alone in such case, the omission of the husband can only be taken advantage of by plea in abatement. If a husband be sued alone for a debt due from his wife *dum sola*, her non-joinder may be taken advantage of in arrest of judgment.

(e) 1 Sid. 387. Horton v. Byles.

(f) Ld. Raym. 1208. Newton and Ux. v. Hatter. So, for debts due to the wife before coverture as executrix or administratrix, 1 Sid. 229. 2 Keb. 89. In consideration that A. will marry his daughter, B. assumes to give her so much. Qu. Must A. and his wife join? 1 Sid. 25.

AMERICAN CASES.

sufficient ground for arresting judgment or reversing it. Gage v. Reed, 15 Johns. Rep. 403.

The husband must be a party by *scire facias* to a judgment on an award made in favour of his wife *dum sola*. Johnson v. Parmely, 17 Johns. Rep. 271.

wife, if the husband die before they are received. (1)

Where they may join.

1. A. But in these cases the husband may sue alone for the injury sustained by himself from the loss of the society and assistance of his wife, in consequence of the injury. (g) And if the husband adopts this method, he may, in the same declaration, complain of a battery to himself; (h) for although the wife ought not to be joined in an action with the husband for the battery of her husband, (i) yet where husband and wife join in an action for a personal wrong to the wife, the husband may declare also for an injury arising solely to himself, *by way of aggravation*; as in trespass by husband and wife for false imprisonment of the wife, "*per quod negotia domestica sponsi remanserunt infecta ad grave damnum ipsorum*;" (k) and trespass will lie jointly with other causes, on a cause for which

(g) Cro. Jac. 538. Hyde v. Scissor.

(h) Cro. Jac. 501. Guy v. Livesoy.

(i) 1 Ld. Raym. 1208. Newton and Ux. v. Hatter.

(k) Ld. Raym. 1301. Russell v. Corne, or for a battery of the wife, "*per quod*" the husband laid out divers sums of money in her cure. 11 Mod. 264. Todd v. Redford, Str. 61. Dix v. Brookes.

AMERICAN CASES.

(1) If the husband and wife join in an action, it must be shewn how the wife has an interest, or it will be fatal on error. Staley v. Bachite, 2 Caines Rep. 221.

singly it cannot be maintained ; as for entering plaintiff's house, and beating his servant, without adding " per quod servitium amisit ;" for the beating here is considered merely a continuation of the first trespass. (l)

Generally, in personal actions for the recovery of damages (other than suits simply in respect of personal injury done to the wife, or choses in action accruing to her *dum sola*.) where the action will survive to the wife, the husband and wife may join, (m) or the husband may sue alone ; for he alone (1) may release the action. (n) Thus,

If a feme sole hath a rent charge, (2) and rent is arrear, she marries, baron distrains for this rent, and thereupon a rescous is made ; this is a tort to the baron himself, and he may

(l) Salk. 119. 6 Mod. 127. Ld. Raym. 1032.

(m) 2 Mod. 270. 1 Freem. 236. *Frosdike v. Sterling*.

(n) 3 Bulstr. 164.

AMERICAN CASES.

(1) For any species of injury done to the wife the husband may release the damages. *Southworth v. Packard*, 7 Mass. Rep. 95.

A judgment in an action by the husband for any species of injury done to the wife, where she might have joined, is a good bar to a joint action by them for the same cause. *Ib.*

(2) In an action for rent or any other cause accruing before marriage, in regard to the real estate of the wife, she must be joined with her husband but for rent of land arising after marriage she need not be joined. *Decker v. Livingston*, 15 Johns. Rep. 479.

have action alone,(o) or may join his wife therein, because it arises upon a duty due to her before coverture.(p)

So if a feme sole having a right to common for life, takes husband, who is hindered in enjoying the common, he may have an action alone without his wife, it being only to recover damages.(q)

So, where the defendant erected two houses of office so near a bakehouse which the plaintiff held in right of his wife, that the walls became foundrous and the air so unwholesome that plaintiff lost his custom ; the action was held to lie for the husband alone, or that the wife might be joined.(r)

In trover, where the inception of the cause of action is in the wife before marriage, the husband may sue alone, or join the wife, at his election.(s)

So, if the goods of a feme sole be taken, and she marries, the husband alone may sue the replevin,(t) or they may be joined in the

(o) Cro. El. 459. Owen, 82. Moor, 584.

(p) Cro. El. 459.

(q) 2 Bulstr. 14.

(r) 2 Mod. 269. Frosdike v. Stirling. So, for stopping a way to the wife's land (Bro. Bar. and Fem. pl. 85.) for cutting down trees, the tops of which were reserved to her, (Cro. Car. 437.) for intruding into the business of a dipper, 2 Wils. 414. So, in trespass, to the wife's property; as for hunting in her free warren, Bro. Bar. and Fem. pl. 16.

(s) 1 Keb. 641.

(t) F. N. B. 159. K. Bull. N. P. 53.

declaration.(u) The avowry too may be by husband and wife, or husband alone, averring the life of feme (x)

Where a right of presentation is in the husband "*jura uxoris*," a "*quare impedit*" may be brought by the husband and wife jointly, or by the husband may alone.(y)

In an action for a breach of promise made to husband and wife,(z) or to wife only,(a) the husband and wife may join.

In debt on bond made to the wife during coverture, the husband and wife may join,(1) or husband sue alone.(b)

So where they have recovered judgment on a bond made to wife *dum sola*, they may join in an action on the judgment, or husband may sue alone.(c)

In debt on bond made to husband and wife, both may join,(d) or the husband may disa-

(u) Bro. Bar. and Fem. pl. 85.

(x) Cro. Jac. 442. *Wise v. Bellent.*

(y) Bro. Bar. and Fem. pl. 41. 28.

(z) Bley, 36. *Hilliard v. Hambridge.*

(a) Cro. El. 61. *Pratt v. Taylor*, 1 Roll. Abr. 32.

(b) Com Dig. Bar. and Fem. W.

(c) 1 Selw. Ni. Pri. 310.

(d) Bro. Bar. and Fem. pl. 14. 55.

AMERICAN CASES.

(1) A bond to the husband and wife, conditioned for their maintenance during their joint and several lives, is a valid bond on which a suit may be brought by the husband and wife jointly. *Schoonmaker v. Elmendorf*. 10 Johns. Rep. 49.

gree to the wife's right and sue alone ;(e) but until such disagreement, the right survives to the wife(f)

If a bond be given to husband and wife administratrix, the husband may sue alone, declaring on it as a bond to himself.(g)

Husband and wife may join in an action of escape against the Warden of the Fleet, where defendant was committed for sums reported by the master to be due to husband and wife.(h)

Covenant will lie by husband and wife(1) for nonpayment of rent, due under a lease granted by them of the wife's inheritance ;(i) or the husband alone may bring the action ; for though the covenant be made to both, yet he may refuse quoad her.(k) So, where husband and wife, lessees, are ousted.(l)

(e) *Coppin v. —*, 2 P. Wms. 497.

(f) Bro. Bar. and Fem. pl. 60.

(g) 4 T. R. 616. *Ankerstein v. Clark*. A bill of exchange was made to a feme sole, who intermarried before it was due, held that the husband might sue in his own name without joining the wife although the latter had not endorsed the bill. *Mc'Neile v. Halloway*. 1 Barn. & Ald. p. 298.

(h) Str. 726, *Huggins v. Durham*.

(i) *Strange*, 280, *Aleberry v. Walby*.

(k) 2 Mod. 217. *Beaver v. Lane*, 4 T. R. 617. Cro. Jac. 399. Cro. Car. 505.

(l) Bro. Bar. and Fem. pl. 23. If A. convey land to B. and covenants with him, his heirs and assigns, to make

AMERICAN CASES.

(1) Vide *Decker v. Livingston*. 15 Johns. Rep. 479. *Whitbeck v. Cook and wife*. 15 Johns. Rep. 483.

It seems to be immaterial as to the point in question, whether the interest of the husband in cases similar to the preceding, be a joint interest *with* the wife, or an interest only in *right* of the wife. *(m)* But it must be observed, that in all the preceding cases, where the wife is made party, her interest ought to appear on the face of the declaration, *(2)* for the court will not intend it upon demurrer; *(n)* though they may perhaps after verdict. *(o)*

Where the Husband must sue alone.

1. B. Where the wife cannot maintain an action for the same cause, if she survive her husband, the action must be brought by the husband alone; as "indebitatus assumpsit" for the labour, &c. of the wife, during coverture. *(p)*

But though the law will not *imply* a promise to wife, yet where the defendant has

further assurance, and the land is to J. S. and his wife, and the heirs of J. S., they must both join in an action on the covenant for further assurance. 1 Roll. Abr. 348. Cro. Car. 503. 505. Jon. 406.

(m) 1 Selw. N. P. 311.

(n) 2 N. R. 405. Serres v. Dodd, where the omission was held bad on special demurrer.

(o) Bull. N. P. 53. Bourn v. Mattaire.

(p) Salk. 114. Buckley and ux. v. Collier.

AMERICAN CASES.

(2) The wife's interest must be shewn when she joins as plaintiff or it will be fatal on error. Staley v. Bachite, 2 Caine's Rep. 221.

derived advantage from her labour or skill, and an express promise of remuneration is made by the defendant to the wife, an action may be brought by husband and wife jointly on such special promise, if it be expressly stated in the declaration: and in this case the action would survive to the wife.(q) Care must be taken that the declaration does not embrace any other cause of action accruing to the husband alone; for if it does, it will be bad.(r)

In an action on the case for words not actionable in themselves, spoken of the wife, whereby the husband sustains special damage, the husband must sue alone.(s) So, in actions for injuries committed during coverture, to personal chattels(t) which by law are vested in the husband; as in trespass for cutting down and carrying away corn, although it grew upon the wife's land; for it grows by the industry of man, and consequently the property thereof is in the husband alone.(u)

In all cases where the wife shall not have the thing recovered, either solely to herself,

(q) Cro. Jac. 77. 205.

(r) Holmes and ux. v. Wood, cited by the court in 2 Wils. 424. Willes v. Baker.

(s) 1 Lev. 140. Coleman v. Harcourt.

(t) Cro. Eliz. 133.

(u) But husband and wife seized in right of wife may join in trespass "quare cl. fregit, et herbam ibidem crescentem consumpsit et asportavit," because grass is the natural product of, and shall continually go with, the land. Willy v. Hanksworth, cited in 2 Wils. 424.

or jointly with her husband but the husband only shall have it, there he must sue alone.(x) And where a debtor to the wife as executrix promises to pay the husband in consideration of his giving day of payment, the husband ought to sue alone, because the wife is no party to his agreement with the defendant ;(y) but the wife's life must be averred ;(z) and the recovery of the husband will amount to a *devastavit pro tanto*.(a)

2. The husband being liable for the debts contracted by his wife before coverture, and answerable for all her torts and trespasses during coverture,(1) an action in these cases must be joint against them both ;(2) for if the

(x) 1 Roll. Abr. 347. 2 Bl. R. 1236. *Bidgood v. Way*.

(y) Lord Raym. 368. *Yard v. Eland*, Salk. 117. Carth. 462.

(z) Yelv. 84. *Lea v. Minne*, Cro. Jac. 110.

(a) Per Holt, C. J. Carth. 463.

AMERICAN CASES.

(1) The husband is answerable for a forfeiture under a penal statute incurred by the wife. *Hasbrouck v. Weaver*, 10 Johns. Rep. 247.

He also adopts the acts of his wife when he permits her to act for him in any particular business. *Fenner v. Lewis*, 10 Johns. Rep. 38. But vide *Webster v. McGinnis*, 5 Binney's Reports, 235. And as to his liability for her acts after separation. Vide 11 Johns. Rep. 281. 12 Johns. Rep. 293.

(2) The husband cannot be sued alone for the debt of his wife contracted before the marriage. *Angel v. Felton*, 3 Johns. Rep. 149.

wife alone were sued, it might be a means of making the husband's property liable, without giving him an opportunity of defence : (b) and therefore if a party recovers against a feme covert as sole, the husband may avoid it by writ of error, (1) and come in at any time and plead it. (c)

(b) Doct. Plac. 3. Besides the husband is only chargeable in the event of judgment against him *during* coverture; whereas if sued alone he would become chargeable absolutely. 7 T. R. 348.

(c) 17 Ass. pl. 17. Stile, 254. 2 Roll. Rep. 53. 3 T. R. 631. The wife may plead coverture in abatement, but not in bar, and it must be pleaded against her in abatement. 3 T. R. 631.

AMERICAN CASES.

If judgment be recovered against the wife whether before or after the marriage, the judgment creditor may sue a *scire facias* or bring an action of debt on the judgment against the husband. *Haines v. Corliss*, 4 Mass. Rep. 659.

But a declaration in *assumpsit* against husband and wife alleging a request and promise made by husband and wife during coverture is bad. *Edwards v. Davis*, 16 Johns. Rep. 281.

So if a count on a promise by husband and wife, is joined with a count on a promise by the wife *dum sola*, and judgment is rendered generally for the plaintiff, it is error. *Ibid.*

A count charging man and wife on a joint assumption in consideration of money had and received by them to the plaintiff's use is bad. *Grasser v. Eckhant*, 1 Bin. Rep. 575.

(1) A husband cannot be sued alone for a debt of the wife contracted *dum sola*, the cause of action surviving

If the wife is not joined in an action for her debt contracted before marriage, advantage may be taken of the omission in arrest of judgment, (d) though an account has been stated with the husband. (e)

If a lease for years be made to baron and feme, reserving rent, an action of debt for rent arrear may be brought against both. (f)

Trover may be brought against husband and wife, where she was concerned; but the conversion must be laid only in the husband, because the wife cannot convert goods to her own use; and the action is brought against

(d) 7 T. R. 348. *Mitchenson v. Hewson*.

(e) *Aleyn, 72. Drue v. Thorne*. The husband may plead bankruptcy, in an action on a bond given by his wife *dum sola*. 1 P. Wms. 249. *Miles v. Williams*. This plea on the statute must conclude to the country. *Selw. N. P. 314*.

(f) 17 E. 4. 7. 2 H. 4. 19. b. 3 H. 4. 1. 1 Roll. Abr. 348. But *assumpsit* lies not against husband and wife on a promise made by the wife during coverture, for it is void *quoad* the wife. *Palm. 313*.

AMERICAN CASES.

against her and the non-joinder of the wife will arrest or reverse the judgment. *Gage v. Reed, 15 Johns. Rep. 403*.

Where the husband distrains for rent arising from the land of his wife, without joining her, he must shew that the rent accrued after the marriage for that fact cannot be intended and if it be not shewn, the objection may be taken at the trial. *15 Johns. Rep. 479*.

both, because both were concerned in the trespass of taking them (*g*).

On the same principle, an action on the case was brought against baron and feme for retaining and keeping the servant of the plaintiff, and judgment accordingly. (*h*)

It would be error to join the wife in a declaration for words spoken by the husband only; (*i*) and such declaration would be bad on demurrer, or in arrest of judgment. Hence if slander be spoken by husband and wife, there must be separate actions; one against the husband only, for the slander spoken by him, and the other against husband and wife. (*l*)

If the husband enter an appearance for himself only, where he is sued with his wife, this will not authorize the plaintiff to sign judgment without demanding a plea. (*k*) But the court will not allow them to sever in pleading, though the wife has a separate maintenance settled on her, and confirmed in the House of Lords. (*l*)

(*g*) Co. Lit. 351. Salk. 114. Andr. 245. In debt on a "devastavit" against baron and feme executrix, it shall not be laid "quod devastaverunt;" for a feme covert cannot waste. 2 Lev. 145.

(*h*) 2 Lev. 63.

(*i*) 2 Wils. 227. Swithin v. St. Vincent.

(*k*) 1 H. Bl. 235. Clark v. Norris.

(*l*) Ca. Temp. Hard. 101. Gordon v. Halfpen.

AMERICAN CASES.

(1) Action will lie against husband and wife for slanderous words spoken by the wife before marriage. Hawk v. Harman, 5 Binney's Rep. 43.

When the wife is arrested in an action against husband and wife, she is discharged on common bail; but the court will not discharge a wife taken in execution on a judgment against her and her husband, *(m)* or on a judgment against her when sole; *(n)* even though the plaintiff had notice of the marriage after interlocutory judgment *(o)*

"Sci. Fa." was held to be well brought against husband (after wife's death,) judgment having been recovered against husband and wife, in a previous "Sci. Fa." on a judgment against the feme *(1)* sole. *(p)*

(m) 2 Str. 1167. Pitts v. Meller, 1237. 1 Wils. 149.

Langstaff v. Rain, 3 Wils. 124.

(n) Cro. Jac. 323. Doyley v. White.

(o) 4 East, 521. Cooper v. Hunchin.

(p) Carth. 30. Obrian v. Ram.

AMERICAN CASES.

(1) Where judgment has been recovered against the wife before marriage, or where the defendant recovers judgment for costs against the wife after marriage an execution cannot be levied on either judgment on his goods nor on his body. Haines v. Corliss, 4 Mass. Rep. 659.

But if an action be instituted against *feme sole* and she afterwards marry, either before or after judgment against her, she may be taken in execution, unless the husband will satisfy the execution. Ibid. Vide also Commonwealth v. Phippsburg, 10 Mass. Rep. 78.

And if judgment be recovered against the wife, whether before or after the marriage, the judgment creditor may have his scire facias or his action of debt against husband and wife. Haines v. Corliss, 4 Mass Rep. 659.

Husband and wife can neither be evidence for(*q*) nor against each other.(*r*) But Commissioners of Bankrupt may examine wives touching their estates.(*s*)

8. The policy(*t*) of the law, which has considered a married woman as incapable of suing or being sued without her husband, *u* admits of some modification from particular circumstances.

By the custom of London.

8. By the custom of London, if a feme covert trades by herself, in a trade with which her husband does not intermeddle, she may sue and be sued as a feme sole; but even there the husband must be made a party to

(*q*) 4 T. R. 670. *Davis v. Dinwoody*, Bull. N. P. 286. See the exceptions, ante chap. iii. s. 6.

(*r*) Defendant's wife lived apart from her husband and passed for a widow, which he countenanced: the wife lent 50*l.* of her own, and 50*l.* of plaintiff's (her servant's) money, on mortgage, and took the deed in her maiden name; the husband seised the deed, and insisted on his title at law. The plaintiff was permitted to establish her property in the 50*l.* by the wife's evidence, plaintiff being ignorant of the marriage. 1 Eq. Abr. 226. pl. 15. *Rutter v. Baldwin*.

(*s*) 21 Jac. 1. c. 19. s. 5, 6.

(*t*) Ante, chap. i. sec. 3.

(*u*) 8 T. R. 545. *Marshal v. Rutton*, 7 E. R. 582. In case of a divorce "a mensa et toro," of which alimony is a consequent, the wife seems to become solely responsible: (Bac. Abr. Bar. and Fem. M.) but not where alimony is only allowed "pendente lite." 5 T. R. 679. *Ellah v. Leigh*.

the suit for conformity ;(x) though if judgment be given against them, execution shall be against the feme only.(y)

The custom is confined to suits in the city courts ; and the feme cannot sue alone in the superior courts, even though she be discovert at the time of commencing the suit.(z) She may be a bankrupt in this trade ; and by a settlement *before* marriage the husband may put his wife in a situation to carry on a separate trade, wherewith, if he do not intermeddle, the stock in trade will be exempt from his debts, and the wife solely entitled to the increase and profits.(a) But where he receives the profits, he becomes liable to debts contracted by the wife in trade, even after her death.(b)

(x) Selw. N. P. 298. 4 T. R. 363.

(y) Cro. Car. 68. Langham v. Bewett. Though liable to simple contract debts in her trade, she cannot give a bond ; and a judgment on such bond, entered up by virtue of a warrant of attorney, will be set aside. 4 T. R. 363. Read v. Jewson, cited.

(z) Candell v. Shaw, 4 T. R. 361. Nor be sued alone, 6 T. R. 605. Nor her executor, on her promise, *ibid.* ; though he have assets sufficient. The probate too of the will is void, *ibid.* A note given to her as such trader vests in her husband ; and her endorsement, unless in his name is void. 1 E. R. 432, 4. Barlow v. Bishop.

(a) 3 T. R. 628. Jarman v. Woolloton. Where the husband was transported, the wife becoming afterwards entitled to some personal estate, as orphan to a freeman of London, it belonged to her as feme sole. 3 P. Wms. 27. Newsome v. Bowyer.

(b) 2 Freem. 215. Bowyer v. Péake.

By exile or abjuration of the Husband.

3. B. A wife may acquire a separate character, by the civil death of her husband, his exile,(c) and, formerly, by his profession and abjuration of the realm.(d)

Or his transportation.

3. C. Where the husband has been transported for a term of years,(1) the wife may sue or be sued as a feme sole during his absence,(e) even though the term may have expired; but when the wife is sued in the latter case, she must give evidence that her husband is not returned.(e)

Or living abroad ;—if an Alien.

3. D. Where the husband is an alien(2) who has deserted this kingdom, leaving his wife to act here as a feme sole, the wife may be charged as a feme sole, for contracts made after

(c) 2 H. 4. 7. Belknap's case.

(d) Bro. Bar. and Fem. pl. 66. Co. Lit. 132. b.

(e) 4 Esp. N. P. C. 27. Carrol v. Blencow. Sparrow v. Carruthers, cited in 2 Bl. R. 1197.

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(1) As to the effect of the husband's condemnation to the State Prison, Vide 10 Johns. Rep. 232.

(2) The wife of a person who has been absent six or seven years cannot be considered as a feme sole. Commonwealth v. Cullins, 1 Mass. Rep. 116. Vide also Fenton v. Reed, 4 Johns. Rep. 52.

such desertion.(f) But there is great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king's privy seal; and there is not any case in which she has been holden liable, the husband being an Englishman.(g) Neither can she sue alone, even in trespass, though her husband (an Englishman) has deserted her, and been absent in America four years.(h) In equity, if the husband be out of the jurisdiction of the court, though not on exile;(i) or if he cannot be found,(k) the wife may be compelled to answer separately.

4. If a feme covert commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coer-

(f) 2 Esp. N. P. C. 554. *Walford v. Duchess De Piennes*, id. 587. 1 Bos. and Pul. 357. *De Gaillon v. L'Aigle*.

(g) 2 Bos. & Pul. 226. *Marsh v. Hutchinson*, 1 N. R. 80. *Farrer v. Countess of Granard*; where the plaintiff replied that defendant's husband resided in Ireland. Heath, J. said, that the case of *Gaillon v. L'Aigle* (1 Bos. & Pul. 357.) proceeded on the ground of the defendant's husband's being a foreigner.

(h) 11 East, 301. *Boggett v. Frier*.

(i) 2 Vern. 613. *Dubois v. Hole*.

(k) Pr. Ch. 328. *Bell v. Commissary Hyde*.

cion of her husband, she is punishable(1) as much as if she were sole.(l)

So, if she receive stolen goods of her own separate act, without the privity of her husband; or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty;(m) for the coercion, supposed to be conveyed by the command or presence of the husband, is only a presumption of law, and like other presumptions may be repelled;(n) and if the husband be ignorantly an agent, by the wife's artifice, she alone is punishable.(o)

But a *feme covert* is so far favoured in respect of that power which her husband hath over her, that she shall not suffer any punishment for committing a bare theft in company

(l) H. P. C. 65. Dalt, 104, 27 Ass. pl. 40.

(m) 22 Ass. 40. Dalt. 157. As a wife cannot steal her husband's goods, delivery of them by her to a stranger will not make him guilty of larceny. H. P. C. 141.

(n) 1 Hale, 516.

(o) Leach's cases, 354. Hammond's case.

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(1) But in Massachusetts it has been decided that a *feme covert* incurs no legal guilt, by commission of civil offences by the coercion of her husband; unless where the crime is *malum in se*, or where the wife may be presumed to be the principal agent. Commonwealth v. Neal et ux. 10 Mass. Rep. 152. Martin v. Commonwealth et al. 1 Mass. Rep. 391.

Thus a *feme covert* is not indictable for an assault and battery, committed in the company and by the command of the husband, *ibid.*

with,(2) or by coercion of her husband.(p) This exemption extends to burglary,(q) and seemingly to robbery, as an offence of a nature not *more* heinous. The reason of this rule is said to be, because the wife cannot know what property her husband may claim in the goods taken.(r) If this be the true principle, the cases of burglary and robbery are in some measure distinguished ; for in burglary the absence or presence of the party is immaterial ; but in robbery, presence is an essential ingredient of the crime, and affords the wife an opportunity of judging in what sort of right the goods are taken.

The wife shall not be deemed accessory to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her ;(s) nor a principal, though the husband's offence be treason, for she is sub potestate viri, and bound to receive him ; neither is she affected by receiving jointly with her husband any other offender,(t) for

(p) Kelw. 31. H. P. C. 65. 27 Ass. 401.

(q) Kelw. 31. Fitz. Cor. 199.

(r) 10 Mod. 63.

(s) 3 Inst. 108. H. P. C. 65.

(t) 4 Hale, 48.

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(2) A *feme covert* cannot be indicted for a larceny committed jointly with her husband. Commonwealth v. Trimmer et al. 1 Mass. Rep. 476. Martin v. Commonwealth et al. 1 Mass. Rep. 391.

she cannot be admitted as a witness to discover, even collaterally, her husband's guilt.(u)

A feme covert, generally, shall answer as much as if she were sole, for any offence, not capital, against common law or statute;(1) and if it be such a nature, that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without her husband, by way of indictment.(x)

She may be indicted for a scold, and judgment against her to be ducked; but scolding once or twice is not sufficient to constitute this offence.(y) Hawkins seems to think she may be indicted for barratry, notwithstanding an authority to the contrary.(z)

She may be convicted alone, under 9 Geo. 2. c. 23. for selling gin;(a) committed for disobeying an order of bastardy;(b) and imprisoned for a forcible entry.(c) Also, she

(u) Brownl. 47. 540. 1 Hale, 301.

(x) 9 Rep. 71. Hawk. P. C. 4. Moor, 813. The husband not being liable to pay the forfeiture recovered on an indictment. Quære, Whether the conviction of a feme covert on an indictment can be pleaded to an information against her and her husband. H. P. C. 27.

(y) 6 Mod. 213. 239.

(z) 1 H. P. C. Bk. 2. c. 21. 1 Roll. Rep. 39.

(a) 2 Str. 1120.

(b) 3 Burr. 1679.

(c) H. P. C. 283.

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(1) Vide Commonwealth v. Neal et ux. 10 Mass. Rep. 182. Martin v. Commonwealth. 1 Mass. Rep. 391.

may be indicted with her husband for keeping a house of ill fame.(d)

And if the wife incur the forfeiture of a penal statute, the husband may be made a party(1) to an *action*, or information for the same, as he may generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon.(e)

(d) H. P. C. 2.

(e) Id. 3.

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(1) The husband is answerable for a forfeiture under a penal statute incurred by the wife, as where the wife, in the absence of her husband and without his consent sold liquors by retail, without a license, the husband was held liable in a *qui tam* action for the penalty given by statute. Harbrouck v. Weaver. 10 Johns. Rep. 247.

CHAP. V.

1. *Of the general Protection afforded the Wife by Chancery.*
2. *Of her separate Estate.* 2. B. *The Wife's power over it.* 2. C. *Of the Wife's Equity, as secured when Property forthcoming to her is in the disposition of the Court, or the Husband has enjoyed it without making adequate Provision.* 2. D. *Of the Wife's Election.* 2. E. *By what Means and how far she forfeits the Protection of Chancery.* 2. F. *How far her Husband's Covenants affect her.*
3. *Of Alimony.*
4. *The Wife's redress for Personal Injuries.*

1. **A** COURT of equity has the power of considering a feme covert as sole, and to treat her as having interests and obligations distinct from those of her husband. If therefore she claims any rights in opposition to those claimed by her husband, or lives separate from him, (a) or disapproves (b) the defence he wishes her to make, she may in equity ob-

(a) Pr. Ch. 329.

(b) 2 Atk. 50. 2 Eq. Ca. Abr. 66.

tain an order(c) to defend a suit separately. If she obstinately refuse, she may be compelled to make a separate defence ; and for that purpose an order may be obtained that process may issue against her separately.(d) It should be observed, however, that though a woman may be proceeded against without her husband, yet the court cannot make a personal decree against her for the payment of a debt ; all they can do, is to call forth her personal property in the hands of trustees, and to direct the application of it.(e)

If a husband is plaintiff in a suit, and makes his wife a defendant,(f) he is considered thereby as renouncing his marital right over her, and she is allowed to answer separately, without an order of the court for the purpose. And as she may defend a suit instituted against her by her husband, so she may institute a suit against him ; but the bill must be exhibited in her name by her next

(c) But a separate answer put in without such order, may be suppressed. 1 Ch. Rep. 68. But see 2 P. Wms. 371. where allowed.

(d) 1 Ch. Ca. 296.

(e) 1 Br. Ch. Rep. 16. *Hulme v. Tenant*, 2 Atk. 68. And this seems to be one reason why a feme covert, though living separate from her husband, cannot sue or be sued alone by strangers, at law. 8 T. R. 545. *Marshall v. Rutton*, Fonbl. Eq. Tr. 108. For the exceptions to this rule, see ante, chap. iv. sect. 3.

(f) Which he may do. *Brooks v. Brooks*, Pr. Ch. 24. 1 Atk. 272.

friend,(g) though she may defend without such protection ; and the court will not permit a bill to be filed without her consent.(h)

The general grounds upon which equity allows a wife to institute a suit against her husband, are, where any thing is given to her separate use ;(i) or the husband refuses to perform marriage articles ;(k) or articles for a separate maintenance ;(l) or where the wife having been deserted by the husband, has in his absence acquired by her labour a separate property, of which he plunders her.(m) And it will decree a specific performance of articles of separation, at the suit of the wife, though the husband offer to take her back again, if it appears that a perpetual separation was intended by the parties ;(n) but not so, where the separation is merely temporary, (o) or there hath been a subsequent cohabita-

(g) 2 Ves. 452. Griffith v. Hood. The husband cannot disavow a guardian made by the court for his wife ; (Vent. 185.) though if an infant in ward marries, the guardianship is determined. (2 Inst. 260. 1 Ves. 91.) But the court will not, on marriage, discharge an order made for a guardian. (1 Ves. 159.) The wife may change her prochein amy during the suit. Bunb. 310. Halphen v. Halphen.

(h) Pr. Ch. 326.

(i) 2 Ves. 452.

(k) 2 Vern. 493.

(l) Gilb. Eq. Rep. 152.

(m) 1 Atk. 278.

(n) 3 Br. Ch. Rep. 619.

(o) 1 Ves. 17. 3 Atk. 547.

tion.(p) Nor is it any answer to such a suit that the wife has been guilty, even of adultery (q) However, her merit must in most cases entitle her to relief, and therefore the court will not decree maintenance where there is full proof of elopement and adultery.(r)

Paraphernalia and pinmoney too are the subject of equitable interference ; and though paraphernalia are not allowed(s) as against creditors, yet where a wife's paraphernalia had been exhausted in payment of her husband's debts, upon the deficiency of personal assets though the court could not decree satisfaction out of the real estates devised, yet it was decreed out of the real estates descended.(t) And paraphernalia shall not go to satisfy legacies ;(u) nor is a wife barred of her paraphernalia by a bequest of furniture, plate, and linen, &c. for life ;(x) nor her claim disappointed by the effect of the option of a creditor ha-

(p) *Fletcher v. Fletcher*, cited in 3 Br. Ch. Rep. 619.

(q) 3 P. Wms. 269. 276. *Blount v. Winter*. Nor any plea to an action brought by trustees on a bond given for the wife's separate maintenance. 1 N. R. 121.

(r) 2 Atk. 96. *Watkins v. Watkins*. Still less assist in any legal claim of divorce for adultery. *Shute v. Shute* Pr. Ch. 111.

(s) 2 Ves. 7. *Lord Townsend v. Windham*. They are preferred to legacies. 1 P. W. 729. *Tipping v. Tipping*.

(t) Amb. 6. *Probert v. Clifford*, Reg. Lib. fo. 310. 3 Atk. 369. Vide 2 P. W. 544. n.

(u) 3 Atk. 369. *Snelson v. Snelson*.

(x) 2 Atk. 217. *Marshal v. Blew*.

ving a double fund to resort to in administration of the assets.(y) And if a husband pledges his wife's paraphernalia, his personal estate, if sufficient, shall be liable to redeem them.(z)

Jewels and chamber plate bought out of the wife's pinmony will be allowed as paraphernalia, if apportioned to the husband's fortune ;(a) and where a wife disposes by will, of the savings of her pinmony, it shall bind the husband and his devisees.(b)

But a wife can only be admitted as a creditor for one year's arrear of pinmony,(c) against her husband's estate ; and if she cohabited with him, it is said she cannot claim the arrears at all ;(d) though in one case, where the husband charged his real estate with his debts a year and three quarters arrear of pinmoney was allowed the widow, in regard that she and her husband had lived well together.(e)

The distinct property which the wife has in her paraphernalia and pinmony, lead us to the consideration of her separate estate at large,

(y) 8 Ves. 397. Aldrich v. Cooper.

(z) 3 Atk. 393.

(a) Pr. Ch. 295. Wilson v. Pack, 26. Offley v. Offley. Savings also : and that, against creditors, if the settlement or the articles for it were made before marriage. Pr. Ch. 295. Or in consequence of a separation after. 1 Freem. 304.

(b) Pr. in Ch. 44. Herbert v. Herbert. 1 Eq. Abr. 66. pl. 3.

(c) 2 Ves. 7. Lord Townsend v. Windham.

(d) 2 P. W. 341. Thomas v. Bennett.

(e) 1 Eq. Abr. 140. pl. 7.

the nature of which it will be necessary to enter on at some length; whether as to the manner of acquiring and enjoying it; the power and manner of disposition exerciseable by the wife over it; and the aid afforded by equity in the protection of such estate.

2. A. Though any thing may by deed or will be given(*f*) in trust for the separate use of a feme covert, and this shall be out of the power of the husband; yet it was formerly much doubted, whether the feme could take an estate to her separate use, unless trustees were interposed(*g*) But in *Bennett v. Davis*,(*h*) it was holden, that where a party devised lands to his daughter, a feme covert, for her separate use, without appointing trustees, it should be a trust in the husband; for there is no difference where a trust is created by act of the party, and where by act of law;

(*f*) The gift may proceed even from the husband, and will be valid against creditors, if made without intent to defraud them, and on good consideration, as where the wife pays the husband's debts, or relinquishes her jointure &c. 6 E. R. 257. *Dewey v. Bayntun*, 10 Ves. 139. *Lady Arundel v. Phipps*. The gift was made in these cases before the creditor commenced his action.

(*g*) 2 Vern. 659. *Harvey v. Harvey*, 1 P. Wms. 126. 2 P. W. 79. *Burton v. Pierpoint*.

(*h*) 2 P. Wms. 316. in *Hulme v. Tenant*, 1 Br. C. C. 16. Lord Thurlow said, a feme covert could have no separate property without trustees; but there was no argument on that point, and the former decisions were not cited.

(i) and equity will not only raise a trust where the object of the gift is to the separate use of the wife, but will also, from the nature of some gifts, infer them to be for her separate use; (k) as diamonds given to the wife by her husband's father on her marriage, a present by a stranger, or trinkets given by the husband during coverture; however, if expressly given by the husband to be worn as ornaments of her person only, they are to be considered

(i) Bunb. 187. Rolfe v. Budder, 3 Atk. 399. Darly v. Darly.

(k) 3 Atk. 393. Graham v. Londonderry. And a bequest "to be at the wife's disposal, and do therewith as she shall think fit," &c. is the same in effect as a bequest to her separate use. 7 Vin. 95. pl. 43. Kirk v. Paulin; for technical words are not necessary to create a separate trust. 3 Atk. 399. Where it was agreed before marriage that the husband should have a certain part of the wife's estate, and that she should dispose of the rest; it was held that she should have the disposal of £5,000, which fell to her after marriage. 4 Vin. 131. pl. 8. Pitts v. Lee.

But a clear intention must appear, where property is meant for the wife's separate use. 5 Ves. 517. Lamb v. Milnes, 545. The mere appointment of trustees, or the testator's knowledge that the wife was poor and living separate, is not sufficient; (1 Raithby's Ver. 261. Palmer v. Trevor;) nor merely bequeathing to her, without mentioning her husband. (3 Ves. 166, Brown v. Clark.) "To the husband for the wife's *livelihood*." 3 Atk. 399. Darley v. Darley. "That her receipt shall be a sufficient discharge." 3 Br. C. C. 381. Lee v. Prieaux.) "to pay into her proper hands," 5 Ves. 540. Hartley v. Harle. have been held to convey a separate property.

as paraphernalia, which the husband may alien in his life-time.(l)

In equity too, gifts may be supported between husband and wife,(1) without the intervention of trustees, though the law does not allow the property to pass.(m) Such gifts however, must not be prejudicial to his creditors, nor of the whole of the husband's estate.(n)

(l) 3 Atk. 394. And if given by the husband, whether before or after marriage, they will be liable to his creditors, (2 Atk. 104. *Ridout v. Lord Plymouth*, where it must be inferred they were given by the husband—to reconcile the case with the preceding:) for they lessen the fund which would have gone to them; which cannot be said where the gift was from a stranger, and equity has raised a trust on it.

(m) 3 Atk. 270. *Lucas v. Lucas*, 3 P. Wms. 334. *Slanning v. Style*, 1 Vern. 245. *Bletson v. Sawyer*, Bunb. 205. 3 Atk. 72.

(n) 3 P. Wms. 334. 3 Atk. 72. *Beard v. Beard*. But though the wife may even have a decree against her husband in respect of such estate, (1 Atk. 278. *Cecil v. Juxon*;) yet if she do not demand the produce during his life-time, and he maintains her, an account of such separate estate shall not be carried back beyond the year. (2 P.

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(1) A feme covert may give her separate property to her husband, as well as to any other person, if her disposition of it be not the result of flattery, or force or improper treatment and such gift will be sustained in a court of equity. *Jacques v. Meth. Epis. Church*, 17 Johns. Rep. 548.

The interest of the wife's separate property is always payable to the husband, if he maintains the wife.^(o) However, where he receives a great part of her fortune, and will not settle the rest, a court of equity will not only stop the payment of the residue of her fortune, but will even prevent him from receiving the interest of the residue, that it may accumulate for her benefit.^(p)

2. B. Females covert having separate estates, are as to such estates, considered as females sole;^(q) therefore⁽¹⁾ whether a power of disposal be vested in Wms. 82. *Powell v. Hankey*, 341. *Thomas v. Bennett* 3 P. Wms. 355. 2 Ves. 7. 190.) This rule, however, proceeds on the notion of the wife's consent; for if, during the husband's lifetime, she demand such account, and he promise to pay whatever is due to her, she shall be allowed to come on his estate as a creditor for the amount. (1 Atk. 269. *Ridout v. Lewis*, 1 Eq. Ca. Abr. 140. A treaty between husband and wife, for the purchase of the wife's separate estate, shall not be carried into execution after the death of the parties,

(o) 2 Ves. 561.

(p) 3 Atk. 24. *Bond v. Simmons*.

(q) 3 Br. P. C. *Freeman v. More*, 378. 3 Br. Ch. Ca. 8. *Fettiplace v. Gorges*.

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(1) A female covert, with respect to her separate estate, is to be regarded in a court of equity as a female sole and may dispose of her property, with the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate. And though a particular mode of disposition be

them(*r*) by the deed creating such estates, or not, they may absolutely dispose of such estates, or of money saved out of them ;(*s*) and this without examination,(*t*) or joining trustees (*u*) Real property too is subject to

(*r*) 13 Ves. 190. 9 Ves. 520. In *Whistler v. Newman* a power of disposing absolutely was *not* vested in the wife at all, for *the trustees* were to *take* the interest from *time to time*, (4 Ves. 129.) and in *More v. Huish*, the intention was the same. 5 Ves. 693. Besides which the conduct of the trustees was in both cases highly culpable. The *method* of appointment enjoined by the deed conveying real property, must be accurately pursued—so too with regard to chattels, where only a qualified property is given the wife. Where husband and wife have a joint power over the wife's estate, the husband's letter to an agent, desiring his wife's compliments, is no proof of her joining in the authority. Amb. 495. *Daniel v. Adams*.

(*s*) 2 Vern. 535. *Gore v. Knight*, 3 Atk. 709. *Hearle v. Greenbank*, 1 Ves. 303. 1 Eq. Abr. 346. pl. 18.

(*t*) 13 Ves. 190. *Sturgis v. Corp.* Examination is necessary where the wife gives up property that has *not* been settled to her separate use, and which the husband cannot recover at law, see post, sect. 2. c.

(*u*) 1 Ves. 517. *Grigby v. Cox*, 14 Ves. 547. *Essex v. Atkins*. Unless their joining is made necessary by the deed appointing them. Where she acts according to her power, they must hold to the uses she appoints. 1 Ves. jun. 189. *Pybus v. Smith*, 3 Pr. Ch. Ca. 565. *Ellis v.*

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pointed out in the deed of settlement, it will not preclude her from adopting any other mode of disposition, unless there be negative words restraining her power of disposition. *Jacques v. Meth. Epis. Church*, 17 Johns. Rep. 548.

such disposition, as well as personal ;(x) and personal estate to the wife's separate use for life, and after her death to such person as she should by will appoint, or, in default of such appointment to her executors, seems to give her the absolute disposal during life ; for personal property, limited to one and his executors, is as absolute, as land to one and his heirs ; and the case of Socket and Wray(y) seems overruled by that of Heathy v. Thomas.(z)

Atkinson, 1 Anstr. 277. And see 1 Blackst. Rep. Compton v. Collinson, 334. Where the husband having covenanted to join in all necessary conveyances, a surrender of a copyhold by a feme covert alone was sustained.

(x) 6 Br. P. C. 156. Wright v. Cadogan.

(y) 4 Br. C. C. 483.

(z) 15 Ves. 596. See also Anderson v. Dawson, 15 Ves. 536. Bradley v. Peixote, 3 Ves. 299. Hales v. Margerum. The gift being absolute in the first place, the condition respecting the will is inconsistent and void. Co. Lit. 223. a. 224. a. But the mere grant of property to the separate use of a married woman does not render her the absolute owner of it, so as to enable her to make a sweeping appointment of it, if it appears that the object of the grant would be defeated by such appointment, as in cases of annuity paid to wives living separate. 3 Ves. 437. Hyde v. Price. So that the *intention* of the person creating the separate estate must always be considered. Hovey v. Blakeman, cited in Wagstaff v. Smith. 9 Ves. 520. A trust to *pay into the hands of the wife*, without any mention of a power in her to dispose, does not give the wife any right to alienate absolutely. Ibid. But a trust to *permit her to receive*, gives her the absolute disposition ;

Where, then, the wife *has* assigned her separate property, the assignee may have the trust executed in equity; but a general creditor, it has been thought, cannot in equity be paid out of that property; neither will equity in general, make good a contract against a married woman on which she cannot be sued at law.(a)

However, a woman having a separate estate will be bound to a specific performance, unless there be proof of fraud or undue influence on the part of the husband;(b) and it has also been determined that a court of equity will compel her heir to convey to the party in whose favour an agreement has been made.(c) And where a married woman agreed to pay her landlord an additional rent out of her separate estate, (without the knowledge of her husband,) in consideration of greater repairs, a bill by the husband, filed

Pybus v. Smith, 1 Ves. jun. 189. 3 Br. C. C. 339. and the introduction of the expression, "to dispose of the same for such intents and purposes as the wife shall from time to time appoint," does not circumscribe the power to make an absolute and sweeping disposition; *ibid.* Witts v. Dawkins, 12 Ves. 501. for such a limitation is incompatible with the original gift.

(a) 2 Ves. Jun. 150. 156. Duke of Bolton v. Williams, 4 Br. Ch. Ca. 309. 311.

(b) 3 Br. Ch. Rep. 340. Pybus v. Smith, 1 Ves. jun. 189.

(c) 6 Br. P. C. 156. Wright v. Cadogan. Rippon v. Dowding, Ambl. 565.

for a return of the money, and suggesting a fraud on him, was dismissed.(d) The bond too of a feme covert as a *surety* was enforced against her separate estate;(e) and where a feme covert having separate estate *borrowed* money on bond, and died ten years after, it was decreed the bond should be satisfied out of the wife's assets left by will, although the husband insisted on the statute of limitations.(f) It has been holden too, that the separate property may be applied to the discharge of a bond given by the wife *before* marriage; but this was where the husband had absconded, so that he cannot be served; for before that occurrence, the plaintiff's first bill against the wife's separate property was dismissed.(g)

Also if a feme covert having separate property borrows money, and executes a bond,(h) or enters into a bond jointly with her husband as a security for his debts, this will give a foundation to demand the money out of her separate estate; and her declarations in such

(d) 2 Br. Ch. Ca. 19. *Masters v. Fuller*, 1 Ves. jun. 513.

(e) 15 Ves. 596. *Heatly v. Thomas*. But securities obtained from a married woman having separate property, by a creditor of her husband, who, suppressing that fact, procured himself to be appointed one of the trustees, were set aside. 16 Ves. 116. *Dalbiac v. Dalbiac*.

(f) 2 P. W. 144. *Norton v. Turville*.

(g) 1 Br. Ch. Rep. *Briscoe v. Kennedy*, cited.

(h) Or promissory note. *Bulpin v. Clark*, 17 Ves. 365.

case may be read in evidence against her.(i) So, a grant of an annuity by a married woman out of her separate estate was established, (notwithstanding notice by the trustees that they would only pay to the wife herself;) the transaction, though for her husband's benefit, being her deliberate act when aware of what she was doing.(k)

On review of all the authorities, it seems that a feme covert having power of disposition

(i) 2 Ves. 190. Norton v. Turvil, 2 P. Wms. 144. Hulme v. Tenant. 1 Br. Ch. Rep. 16. Stanford v. Marshall, 2 Atk. 68. The bond, though a nullity, is evidence of her intention. Per Ld. Eldon, in Parkes v. White, 11 Ves. 209.

(k) 14 Ves. 542. Essex v. Atkins, 9 Ves. 520. But where husband and wife had raised money upon very extravagant terms, by way of annuity charged on the wife's separate estate, the court would not enforce the security, but dismissed the bill. 5 Ves. 694. Moers v. Huish. And it must be observed, that the cases of Duke of Bolton v. Williams, (2 Ves. jun. 138.) and Jones v. Harris, (9 Ves. 486.) seem in effect to overrule the case of Hulme v. Tenant, and consequently to shake those of Heatly v. Thomas, and Bulpin v. Clark; so that the extent of the liability of feme covert's separate property to her general engagements (that is, to her bond, or any other instrument not specifying the property to be affected, or the mode in which it is to be affected,) cannot be considered as well settled. Lord Eldon said Hulme v. Tenant was a prodigiously strong case, (Nantes v. Corrock, 9 Ves. 188.) and that the case would require full consideration if ever the point should distinctly occur. (Jones v. Harris, 9 Ves. 486.)

over it, may give her estate to her husband, as well as to any one else, however formally and strictly it may be limited to her separate use.^(l) But though the cases never intended to forbid this, where the husband behaves well, yet it is an act that the court looks upon with the utmost jealousy.

However, where the wife's separate estate and provision is not an immediate enjoyment, but contingent on the event of her surviving her husband, and no absolute power of disposition over it, is reserved to her by the deed securing such contingent provision, equity will not permit her to make a transfer of it to her husband.^(m) As where property is settled on the husband for life, and if he survive his wife, to him absolutely; but if she survive, to her absolutely. In this case the husband can have no rightful claim to the wife's interest created for her benefit, with his concurrence: an interest too, of such a nature, that if created by a third person, he could have no power over it, as not taking effect in

(l) 11 Ves. 209. *Parkes v. White*. And the court will compel trustees to convey according to her disposition, where properly made. Per Lord Eldon, *ibid*.

(m) 10 Ves. 580. *Richards v. Chambers*. *Seamen v. Duel*. Where all the cases are considered. See too 8 Ves. 164. *Sparling v. Rochfort*; where the court dismissed a bill, stating that the wife was willing, at *some future period*, when the court according to its rules could ask her to give her consent, that the husband should retain a *residue unascertained*.

possession during his life : the wife's consent, on examination, can only be availing where she has a disposing power ; and as a feme covert she has no power of disposition (such power not being reserved by deed) over a contingent property like the present, whatever she might have over separate property in her actual enjoyment ; neither will equity by conceding such a power deprive the woman of the only indefeasible means of securing a provision for her widowhood. " Such, (says Sir William Grant) were the terms upon which alone she chose to contract while in a condition to exercise her unbiassed judgment : she meant while *sui juris* to make a provision for herself, in the event of her surviving her husband, and to secure it from the effect of the influence and solicitations to which she might afterwards be exposed. She might be told, that there is no way in which that end can better be accomplished, than by the means which have been adopted, that absence of power, and legal incapacity to act, is the best security. If the court will *not* interfere, a woman about to marry has the power to secure to herself this kind protection ; but she is deprived of it, if the court, upon her consent while covert, annuls the contract made for her benefit while *sui juris*."

If a wife charge her estate with the payment of her husband's debts, or apply it to such purposes, and this do not appear to be intended by her as a gift to him, equity will decree the husband's assets to be applied in exone-

ration of her estate, or in re-payment of the money advanced.(n)

For the wife's separate property cannot be taken in execution by her husband's creditors, even though it were conveyed to her by her husband after marriage, provided that this were bona fide without intent to defraud creditors, on valuable consideration, and before action commenced.(o)

Even a voluntary conveyance to a wife, after marriage, has been held good against creditors, where the husband made it in consideration of an accession to his wife's fortune, and the settlement before marriage was inadequate.(p)

(n) 2 Vern. 337. 1 Br. P. C. 1. Pocock v. Lee, 2 Vern. 604. 689. 1 P. Wms. 264. 2 Atk. 344. In Tate v. Austin, 1 P. Wms. 264. it is said, that all other debts must be first paid. But in Robinson v. Gee, 1 Ves. 252. Lord Hardwicke appears to have denied that the other creditors can come in pro tanto on the wife's estate, where she has been first paid; and if *at the time* when a mortgage or security is made by the wife for the payment of the husband's debt, (whether before or after marriage) a settlement is also made, the husband is not considered as answerable to the wife's estate for the money borrowed. Per Lord Hardwick in Lewis v. Nangle, Ambl. 150. the general right of the wife may also be repelled by evidence to shew her intention that her own estate should bear the charge. 3 Br. Ch. Rep. 201. Clinton v. Hooper.

(o) 10 Ves. 139. Lady Arundel v. Phipps, 6 East, 257. Dewy v. Bayntun. See further on this head, ante, chap. ii. s. 1. note at the end, and post, chap. ix.

(p) 3 Atk. 720. But after marriage a voluntary con-

If trustees pay the wife's separate fortune to the husband, it is irrecoverable ;(*q*) but, with respect to property, not settled to her separate use,

2. C. Where such property or interests forththcoming to a married woman are by any means in the power of a court of equity, the court will not yield them up, unless the husband make a proper settlement(*r*) (that is, adequate to the fortune he receives) or the wife in court consent to his receiving it ;(*s*) (equity has even gone

veyance without some such considerations as the preceeding, would be void against subsequent purchasers for a valuable consideration, and creditors. 3 Atk. 410. 412. White v. Sansum.

(*q*) 2 Atk. 420. 1 Fonbl. Tr. Eq. 304. Pr. Ch. 414. Squire v. Dean, 4 Br. Ch. Rep. 326. And the wife cannot charge the husband's heir for it. 10 Ves. 511. Lench v. Lench.

(*r*) Nels. Ch. Rep. 377. Wentworth v. Young, 2 Vern. 494. Oxenden v. Oxenden, Skin. 288. except where the husband *has* made an adequate settlement, or the settlement was *expressed* to be made in consideration of future accessions. Blois v. Countess of Hereford, 2 Vern. 501. Cleland v. Cleland, Prec. Chas. 63. Ambl. 692. and such settlement should be made *before* marriage in order to be availing. Lanoy v. Duke of Athol, 2 Atk. 444. If the settlement be made in consideration of *part* of the wife's fortune, choses in action not comprised in that part, survive to the wife. Prec. Ch. 63.

(*s*) Finch's Rep. 145. 1 P. W. 768. 2 P. Wms. 639. 1 Str. 238. 1 Ves. 539. 2 Atk. 67. 448. If the wife be abroad, the examination and consent must be taken by

so far as to restrain him from proceeding in the spiritual court for the wife's portion arising out of personal estate, because that court cannot oblige him to make an adequate provision on her.(t) But this equity is personal to the wife, for if she die in the husband's lifetime, leaving children, he is entitled to her personal property without making provision for them ;(u) and so are his assignees.(x) And

"dedimus," as in the case of a fine : or by a magistrate of the place, with an attestation by notaries, and a translation. (2 Ves. 60. *Parsons v. Dunn*, 3 Br. Ch. Ca. 237. 3 Br. Ch. Ca. 663. *Minit v. Hyde*.) In America, by a commission issuing under the government there. 3 Ves. 321. *Campbell v. French* ; in one case under particular circumstances, a letter from the wife in the East Indies was held sufficient. *Dick*, 293. *Palmer v. Palmer*, The wife must be apprised of the amount before her consent. *Anstr.* 93. *Edward v. Townsend*.

(t) Pr. Ch. 543. 2 Atk. 420, restrained till he makes an adequate settlement, *Toth.* 114. *Tanfield v. Davenport* : and if he refuse, will order the interest to accumulate for the wife, unless he be starving. 3 Atk. 20. *Bond v. Simmar*.

(u) *Ambl.* 509. *Scriven v. Tapley*. A fund decreed to be secured for the benefit of the wife and her issue, till the husband makes a settlement, shall belong to her if she survive, though there be issue of the marriage. *Fonbl. Eq. Tr.* 97. *Phipps v. Earl of Anglesea*. But if the surviving wife die without issue, the husband's representatives are entitled to it. *Packer v. Wyndham*, Pr. Ch. 418. *Contra*, *Wytham v. Cawthorn*, 1 Eq. Ca. Abr. 392. pl. 1.

(x) 3 Atk. 717. Except where an order has been obtained for a settlement on the wife and children : which is

a court of equity will not in general interrupt the legal title of the husband to the property of his wife, unless called on by him to lend its assistance; then, if he ask for equity, he must do equity, by providing for his wife.^(y) However, it seems from the case of *Winch v. Page*, (Bond. 87.) supported by an expression of Lord Hardwick's, in *Jewson v. Moulson*, 2 Atk. 420. that if the husband sues at law for a chose in action, as a bond due to his wife, the court if the wife pray it, or the obligor, he being her father will grant an injunction till the husband makes a proper settlement.

Lord Hardwick appears to have refused to order the whole of the wife's fortune to be paid to the husband, though the wife was in court and desired it.^(z) But in *Willats v. Cay*, the Master of the Rolls is reported to have ordered the wife's whole fortune to be paid to the husband though insolvent,^(a) the wife be-

indefeasible, though the husband die before any proceeding on it. 10 Ves. 84. *Murray v. Lord Elibank*.

^(y) 1 P. W. 378. *Squib v. Wyn*, 2 P. Wms. 639. *Milner v. Colmar*, 3 P. W. 11. 2 Atk. 420. 5 Ves. 515. And this equity will be granted, whoever may be the applicant to the court, the wife or her trustees, as well as her husband or his assignees. *Ex parte Coysegame*, 1 Atk. 192. *Mealis v. Mealis*, 5 Ves. 732. in note. *Id.* 737. *Elibank v. Montolien*, 10 Ves. 574.

^(z) 2 Ves. 579. *Ex parte Higham*, Ca. Temp. Talb. 43. *Blackwood v. Norris*, cited.

^(a) 2 Atk. 67. As to *part* of her fortune, if she persists in requiring it to be paid to her husband, the court *must* comply, 3 Br. Ch. Ca. 197. *Dimmock v. Atkinson*.

ing in court and consenting. The wife's consent cannot by the rules of the court be dispensed with, if the sum exceed 100 guineas; (b) nor will the court part with the property, even with such consent, unless there be an affidavit both by husband and wife, that the property is not settled. (c)

But with the consent of the wife, money left in trust for the wife and her heirs, to be laid out in land, was ordered to be paid to the husband without being invested in land. (d) So, stock standing in the name of trustees under a settlement, the dividends to be paid to the wife, or to such uses as she should from time to time, during coverture, appoint, was ordered upon her consent to be paid to the husband, though there was no appointment. (e)

And a legacy given the wife for her sole use, with a power of appointment by will, was ordered with her consent, to be paid to her husband; (f) so, money settled in like manner, (g)

The husband as we have seen, has generally the absolute disposition of all his wife's personal property. But he cannot assign a

(b) 3 Br. Ch. 237. 1 P. Wms. 768. 2 Atk. 67. 448. 452. 2 Ves. jun. 512.

(c) 2 Br. Ch. Ca. 663. 2 Ves. jun. 38—1. 512. Binford v. Bowden.

(d) 3 Atk. 71. Pearson v. Brereton.

(e) 3 Br. Ch. Rep. Clarke v. Pester, cited.

(f) Ibid. Newman v. Cartony.

(g) Id. Ellis v. Atkinson.

possibility, or contingent interest in a term, to which she may be entitled; that is, where the possibility is of such a nature that it cannot happen in the lifetime of the husband; *(h)* nor will his disposition of her choses in action be availing against her, unless for a *valuable* consideration. *(i)* And where the property is the subject of equitable jurisdiction, and the husband's assignees *(k)* are obliged to go into equity for the recovery of it, they are subject to the same equity as the husband, and must previously make provision for the wife: *(l)* nor is this doctrine confined to general assignees, but seems equally to hold as against a particular assignee for a valuable consideration. *(m)*

(h) Co. Lit. 46. b.

(i) 2 Atk. 207. Bate v. Dandy, 417. Jewson v. Moulson, 1 Br. Ch. Rep. 44. Dick. 340. Beckett v. Beckett.

(k) Whether bankrupt assignees, 1 P. Wms. 362. Jacobson v. Williams, or assignees for payment of debts; (4 Br. Ch. Rep. 139. Prior v. Hill,) and see Like v. Beresford, 3 Ves. jun. 506. which involved circumstances so favourable for the assignee, that he must have prevailed if any case could affect the wife's equity.

(l) 1 P. Wms. 251. Miles v. Williams, 382. 2 Atk. 417. Jewson v. Moulson, 2 P. W. 639. 5 Ves. 515. 2 Atk. 67. 440. A chose in action (as a mortgage) belonging to the feme when sole, passes by the assignment on her husband's bankruptcy, unless reserved by articles before marriage, 1 P. W. 458.

(m) Macauley v. Philips, 4 Ves. 17. Id. 528. Franco v. Franco, 3 Ves. 506. Unless perhaps a trust term is to be considered an exception, because it may be taken at law under a Fi. Fa. 4 Ves. 19. 528. 2 Vern. 270.

The equity, as we have seen, is personal to the wife, and does not extend to children :*(n)* and it is doubtful whether equity will interfere where the assignees can get possession without the aid of Chancery.*(o)* The following cases will perhaps best explain the nature and occasion of such interference.

Where a feme covert was a ward of the court, her property was ordered to be settled on her in opposition to the husband's assignment for a valuable consideration ;*(p)* so, where money was declared due to a wife, the court would not order it to be paid to her trustees on motion, till the Master had made his report on the settlement.*(q)* A large legacy was left to the defendant's wife, for which he sued in the spiritual court ; testator's executors filed a bill for an injunction against

(n) Amb. 509. *Scriven v. Tapley*. And the wife in general is entitled only to a part and not to the whole of the property belonging to her. 2 Ves. jun. 607. *Burdon v. Dean*. If she obtains an order for a settlement on herself and her children, and dies before any further proceeding on it, the children have an interest in that order, of which they cannot be deprived. *Murray v. Lord Elibank*, 10 Ves. 84.

(o) 2 P. W. 639. 515. 440. It seems a general rule, that where a woman by marriage agreement is to have the separate use of any estate during coverture, if any of it is invested in a purchase, the court will follow it, as the produce of what she ought to have. 2 Eq. Abr. 148. pl. 2. *Eastby v. Eastby*.

(p) 3 Ves. 506. *Like v. Beresford*.

(q) 1 Anstr. 274. *Hardwick v. Wynd*.

the husband ; per curiam, the money shall be secured to the wife, whoever may be the plaintiff to ask it in equity.(r) And upon a bill by husband and wife for money in her right, the court will decree it to them jointly, that the wife may have a chance of survivorship.(s)

Where lands were devised to a wife's separate use, but no trustees were appointed, the husband was held a trustee for his wife ; and though he became bankrupt, the lands were not allowed to pass to his creditors.(t) And even where a settlement was made by a husband in consideration of the fortune he would receive with his wife in marriage, (no intention being expressed that he should be benefited by any future accession) it was held that a subsequent interest arising to her as next of kin, should not go to the assignees under her husband's bankruptcy.(u) The same equity extends to a legacy bequeathed to the wife under the same circumstances, and not reduced into possession by the husband in his

(r) 1 Str. 503. *Gardener v. Walker.*

(s) 2 Ves. 669. *Pawlet v. Delaval.*

(t) 2 P. W. 316. *Bennet v. Davis.* The same, as to chattels, 7 Vin. 95. *Kirk v. Paulin.*

(u) 10 Ves. 574. *Carr v. Taylor.* So where trustees possessed the husband of his wife's fortune, in consideration of his making a settlement, equity supported the settlement, though made after marriage and impeached by creditors. Pr. Ch. 22. *Moore v. Ricault*, 1 Ves. 196. *Dundas v. Dutens*, 2 Atk. 519. *Middlecombe v. Marlow.*

lifetime ;(x) for, as we have seen, a settlement in consideration of the wife's fortune, does not entitle the husband to future accessions, unless they be expressly mentioned in the settlement, or reduced into possession by him in his life-time.(y)

As equity will compel a performance of marriage articles ;(z) so it will prevent the husband from defeating his own agreement by disposing of a future executory interest in a term, or other chattels provided for the wife with his consent.(a)

The court will interfere too, in securing a provision to the wife where no settlement has been made, or an agreement for one has not been fulfilled, or the husband has disposed of his wife's portion without having secured her an adequate remuneration.

Thus, where the husband had received great part of a legacy which was the wife's only portion, and refused to make a settlement, the court stopped the residue and the interest also, that it might accumulate for the wife's benefit.(b) And where J. S. having

(x) 9 Ves. 87. *Mitford v. Mitford* ; and in one case the wife's equity was extended to the rents of her real estate vested in trustees. 2 Ves. jun. 607. *Budon v. Dean*.

(y) Ante. chap. ii. sec. 3.

(z) 2 Vern. 493.

(a) 1 Ch. Ca. 225. *Doyley v. Perful*, 1 Vern. 7. 18. 1 Eq. Ca. Abr. 58.

(b) 3 Atk. 20. *Bond v. Simpson*. A., on marriage, having agreed to settle his wife's stock on her for her use,

made an assignment of 400*l.* per annum, part of the dividend of stock to the amount of 260*l.* per annum, invested in trust for his wife, went abroad without having made any provision for her; and A. B. his surety filed a bill to enforce the husband's assignment, an indemnity to him against past and future payments; and the same was established, upon a bill filed on behalf of the wife, the court directing the remaining 160*l.* per annum to be paid to her.(c)

The wife of a bankrupt filed a bill for her distributive share of the residue of an intestate's personal estate; as the husband had not by his settlement expressly included for himself future accessions to his wife's fortune, as well as the portion belonging to her at the time, his assignees were directed to make a proposal for an adequate settlement in respect of the property accruing from the intestate; but were allowed to take into consideration the settlement already made upon her: (the administrators of the intestate were not allowed to set off a bond due from the bankrupt to the intestate.)(d)

Where the trustees in a marriage settlement lent part of the trust monies to the husband, upon his bond, when in full credit, and he

fraudulently prevailed on her to transfer the stock to him without a settlement. Decreed he should transfer the stock to the use of his wife, and pay all costs. 1 Ves. jun. 21: Lampert v. Lampert.

(c) 11 Ves. 12. Wright v. Morley.

(d) 10 Ves. 524.

purchased an estate to himself in fee,—became bankrupt, and the estate was conveyed to his assignees,—the estate so purchased was ordered to be conveyed to new trustees, upon the trusts of the settlement, and the residue of the bond debt to be proved under the commission against the husband : (e) and though a bond by a husband to pay a sum in the event of his bankruptcy, or insolvency, cannot stand against creditors, the property of the wife may be limited to the husband till he becomes bankrupt or insolvent, and on that event, for his wife and children : and where in articles for such a settlement, the husband covenanted to give a bond for £,000l. upon the same trusts and had received all his wife's fortune without making any settlement, proof was admitted under his commission, not only for the amount of her property agreed to be settled ; but the £,000l., or so much as the value of the wife's property would extend to beyond the sum agreed to be settled. (f)

Where a husband covenanted in his marriage settlement to convey sufficient in value to answer an annuity which his wife had at the time of her marriage, but died without having so done, the court decreed the deficiency to be made good out of his estate. (g)

(e) 2 Dick. 593. *Wilson v. Foreman*. Sed quære, and see *Lench v. Lench*, 10 Ves 511.

(f) 8 Ves. 353. *Ex parte Cooke*. Vide 2 Str. 947, *Lockyer v. Savage*.

(g) *Matthews v. Matthews*, Dick. 470. Where a hus-

So, where the wife dies leaving issue, while he is under an order to make a settlement, the court will bind him to the order (*h*) And the wife's elopement with an adulterer was held no bar to a specific performance of the marriage articles. (*i*)

Where husband and wife mortgage the wife's estate, and the husband receives the money, his estate shall be liable to redeem; (*k*) but the claim, though preferred to charity legacies, is postponed to simple contract debts; (*l*) and the estate shall be liable, though the husband except his wife's debt from those to be paid (*m*) A wife having joined her husband in mortgaging her estate to buy him a place, and the husband having afterwards paid the money, taken up the mortgage term, and devised it to the younger children, it was decreed the heir of the wife should have the term discharged of the husband's claims. (*n*) And in a mortgage by baron and

band on marriage imposed on his wife by giving her a bond void at law, equity established the agreement according to the intent of the parties. 2 Atk. 96. *Watkins v. Watkins*.

(*h*) Dick. 604. *Rowe v. Jackson*.

(*i*) 3 P. W. 268. *Sidney v. Sidney*. But see Dick. 321. 806. *Lee v. Lee*, where the court would not assist a wife who had eloped, in recovering her separate property.

(*k*) 2 Vern. 604. *Pocock v. Lee*.

(*l*) 2 Vern. 689. *Tate v. Austen*.

(*m*) 3 Br. Cha. Ca. 545.

(*n*) 1 Br. P. C. 1 *Huntingdon v. Huntingdon*.

feme of the feme's New River shares, without a fine, the lease was held determined by the death of the husband, and the mortgage at an end.^(o)

3. D. When two species of provision are appointed for the wife, and it clearly appears from express declaration or necessary inference, that it never was intended she should enjoy both at once, the wife is put to her election.^(p) The nature of this election, when it lies between jointure or dower, and some other provision, is explained in the chapters on those subjects: we may here consider how it stands in other cases. As where A. covenanted on marriage, that if his wife survived, she should have half her fortune secured: A. died, and left her more than she could claim. Per curiam, the legacy shall be considered in satisfaction of the covenant; but the wife shall elect which portion she pleases.^(q) So, where A. tenant in tail, (remainder to B., the wife of C., in tail,) conceiving he had obtained a fee, under a void execution of power, granted leases, and then devised the estate to B. for life, remainder over, and gave B. and C. other benefits under his will, leaving D. residuary legatee; upon a bill by D. to establish the will, B. elected to take her estate tail in opposition to the will, which the Master reported to be for her be-

(o) 2 P. W. 127. *Drybutter v. Bartholomew*.

(p) 2 Ves. jun. 572. *French v. Davies*, 3 Ves. 249. *Strathan v. Sutton*.

(q) 2 Eq. Abr. 34. pl. 1. *Corus v. Farmer*.

nefit, and it was decreed accordingly.(*r*) So, where a wife has one claim under the will of her former husband, and another against it, she shall elect between them.(*s*)

And though she shall not always be precluded, by having received one portion, if she should afterwards discover that the other is more beneficial ;(*t*) (as where testator gave his wife an annuity, charged on an estate of which she would be dowable; and this was held a case of election, but that the widow had not made her election by accepting the annuity for three years :(*u*) and where the husband of an infant widow having entered on the settled estate, her election was held to be bound, only during the coverture ;)

Yet she shall make her election within a proper time, and be bound by it. Thus, a widow, who (having different interests under her settlement, and the husband's will,) proved the will, acted under it, and received the rents for six years, was held to have made her election.(*x*) However, no line can be drawn as to the precise act or time that con-

(*r*) 2 Ves. jun. 544. *Darlington v. Pulteney*, 3 Ves. 384.

(*s*) 5 Ves. 515. *Blount v. Bestland*.

(*t*) Especially where her election was made under a mistaken impression of the extent of the claim. 12 Ves. 126. *Kidney v. Coupmaker*.

(*u*) 3 Br. Ch. Ca. 255. *Wake v. Wake*.

(*x*) 3 Br. Ch. Ca. 88. *Butricke v. Broadhurst*.

stitute an election binding: it must depend on the circumstances of the case; and it seems that where the court has held the wife bound, they have ever ascertained that her election was of the most beneficial alternative; and have even decreed against her election, where it appeared prejudicial to her children. (y)

When it is not clearly inconsistent with the husband's intentions, the wife shall have both provisions: as where A. on marriage covenanted to secure 1,000*l.* per annum to his wife, in lieu of dower, and by his will devised to her considerable real and personal estate, she was held entitled, both to her annuity and the devise. (z)

2. E. A woman by ill conduct forfeits, in most instances, the interposition of Chancery in her favour. Thus, if she elope without cause, and refuses to return, equity will not assist her in recovering her separate property. (a) And where husband and wife living apart under a divorce a mensa et toro obtained against the wife for adultery; the wife petitioned that her money might go to her separate use, and the husband petitioned it might be paid to him, the Lord Chancellor would make no order. (b) Nor would equity allow

(y) 2 Vern. 605. *Hancock v. Hancock*.

(z) 7 Br. P. C. 12. *Broughton v. Errington*, 3 Br. P. C. 514. *Lucy v. Moore*, 3 Br. Ch. Ca. 241. *Forsyth v. Grant*.

(a) Dick. 321. 806. *Lee v. Lee*.

(b) *Carr v. Eastbrook*. A wife divorced a mensa et

a wife maintenance, after full proof of elopement and adultery ; and the obtaining a "supplicavit," does not justify an elopement.(c)

However, where the wife sues for a specific performance of her marriage articles, her elopement with an adulterer seems no bar.(d) And where a wife's fortune was settled in trust, but no provision was made for payment of the interest during coverture ;—she quitted her husband and lived in adultery ;—on a bill for payment of the dividends, the court decreed the husband to provide for the wife, but ordered the future dividends to be paid into court, and the costs out of the accumulated dividends.(e) It appears too, that the adultery of the wife is no plea to a bond given by the husband to trustees for the wife's separate maintenance ; and this, though the wife were guilty, and the husband ignorant of the adultery, at the time he entered into the bond.(f)

2. F. There are some early cases in which the court seems to have enforced the husband's agreement to dispose of his wife's property, or his covenant that she should levy a toro, forfeits her right to widow's chamber, under the custom of London : and she cannot claim administration in the spiritual court till the divorce is repealed. Bunb. 16. Pettifer v. James. Pr. in Ch. 111. Shute v. Shute.

(c) 3 Atk. 550. Head v. Head.

(d) 3 P. W. 268. 275. Sidney v. Sidney.

(e) Ball v. Montgomery, 4 Br. Ch. Ca. 339. 2 Ves. jun. 191.

(f) 1 N. R. 121. Field v. Serres 13 Ves. 439.

fine. However the interference of the court in such cases would effectually deprive married women of any power to reserve a separate property to themselves. And in *Emery v. Wase*,^(g) the Master of the Rolls said, he had no conception that as against them any such agreement could be enforced; binding their interests by agreement, though they could not be bound by conveyance. How far the husband is liable in damages for not making good the agreement, or how far in equity he will be compelled to prevail on his wife, is another consideration.

There have been instances of committing the husband to the Fleet till the wife should do the act; and there was one instance where the husband staid a great while in prison; and then, making it appear that he could not prevail on her, was discharged.^(h)

Where a husband and wife jointly agreed to convey, the husband was decreed to convey, and to procure his wife to join, or to refund the money received: but the court would not make personal decree on the wife.⁽ⁱ⁾

Under particular circumstances too, a husband was decreed to procure his wife to join in a surrender of copyhold estate.^(k)

^(g) 5 Ves. jun. 848.

^(h) 5 Ves. jun. 848. See 3 P. W. 189. 5 Vin. 544. pl. 35.

⁽ⁱ⁾ 2 Ves. 57. *Sedgwick v. Hargrave*.

^(k) 7 Ves. 474. *Stephenson v. Morris*.

4. As to alimony, it has been decreed by equity in many cases, where it does not appear whether the decrees proceeded upon a previous divorce in the spiritual court, or upon an agreement between the parties ;(*l*) but in *Williams v. Callow*,(*m*) the court appears to have decreed the wife a separate maintenance out of a trust fund, on account of the cruelty and ill behaviour of the husband, though there was no evidence of a divorce, or agreement that the fund in dispute should be so applied. And in *Watkins v. Watkins*,(*n*) the husband having quitted the kingdom, Lord Hardwick decreed the wife the interest of a trust fund till he should return and maintain her as he ought.

Yet in *Head v. Head*,(*o*) Lord Hardwick

(*l*) 1 Ch. Rep. 24. *Lasbrook v. Tyler*, 87. *Ashton v. Ashson*, 99. *Ressell v. Bodwill*, 118. *Whorewood v. Whorewood*, 1 Ch. Cas. 250. were all, except *Lasbrook v. Tyler*, during the troubles, and the decrees of the Commissioners confirmed by the act for that purpose. 1 Ch. Rep. 118. in 2 Vern. 76. *Nicholls v. Danvers*. Proceedings had been laid in the ecclesiastical court, propter sævitiam: in *Angier v. Angier*, Gilb. Eq. Rep. 172, there was an agreement; in *Oxendon v. Oxendon*, a divorce.

(*m*) 2 Vern. 493. 671. 752.

(*n*) 2 Atk. 96. 11 Ves. 20. 2 Ves. 191. 4 Ves. 798. Where the husband was in a state of imbecillity, a fund in court belonging to him was ordered to be paid to the wife for the maintenance of the family. 4 Br. Ch. Ca. 100. *Bird v. Lefevre*.

(*o*) 3 Atk. 547. A covenant by a husband to pay trustee an annual sum by way of separate maintenance for

observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even then unwillingly. And this opinion of Lord Hardwick appears most reconcileable to principle; for the case of a divorce *propter sævitiam*, may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt but that courts of equity may, concurrently with the spiritual court in proceeding upon it, decree a separate maintenance.^(p) The spiritual court, however, would be the more proper jurisdiction, if acted in *rem*.^(q) And Lord Loughborough is reported to have said, that he took it to be settled law, that no court, not even the ecclesiastical, has any original^(r) jurisdiction to give a wife separate maintenance; it is always as incidental to other matter, that she becomes entitled to a separate provision. If she applies to the Chancery upon a *supplicavit*, for security of the peace against her husband, and it is ne-

his wife in case of their future separation with the consent of trustees, is valid in law. 2 East, 283. Lord Rodney v. Chambers.

(p) Wood's Inst. 62. 2 Vern. 386. Sealing v. Crawley, 3 Br. Ch. Rep. 6. Guth v. Guth. Equity considers the agreement waived, if afterwards the parties cohabit. 3 Br. Ch. Rep. 619. Fletcher v. Fletcher.

(q) Lit. Rep. 98. 2 Atk. 511. 3 Ves. 352. Legard v. Johnson.

(r) 2 Ves. jun. 195. Ball v. Montgomery.

cessary that she should live apart,^(s) as incidental to that, the Chancellor will allow her a separate maintenance. So, the ecclesiastical court, if it is necessary for a divorce a mensa et toro propter sævitiam.^(t)

But though the court cannot decree alimony or a separation, yet it can enforce articles of separation voluntarily entered into: however, if the parties choose to come together again, the articles are no longer binding.^(u)

And where a wife filed a bill for performance of an agreement, and for alimony, she being compelled, by her husband's cruelty, to leave him, the court decreed her 500*l.* to carry on the suit.^(x) So where a husband, by force compelled his wife to execute a deed of separation, allowing a maintenance inferior to her rank and fortune, equity will decree a proper maintenance.^(y)

By deed executed before marriage, it was agreed that if any separation should take place by the desire, or at the instance of the wife, then the husband should receive the

^(s) But the obtaining a supplicavit does not justify the wife's elopement. 3 *Atk.* 550. 547.

^(t) 2 *Ves. jun.* 195. And when the husband has once entered into a bond to trustees, for the wife's separate maintenance, her adultery before or after the bond was given, though given in ignorance of it, would be no plea to an action on the bond. 1 *N. R.* 121. 13 *Ves.* 439.

^(u) *Gilb. Eq. Rep.* 142. *Angier v. Angier*, *Pr. in Ch.* 496.

^(x) *Dick.* 498. *Yeo v. Yeo*.

^(y) 6 *Br. P. C.* *Lambert v. Lambert*.

moiety of an annuity which the wife was possessed of, and she should receive the other moiety without the control of her husband; but if such separation should take place at the instance, or by the means of the husband, then the wife should receive the whole annuity. Equity will support this agreement; and if the separation appears to be caused by the means of the husband, the wife shall have the whole annuity during such separation.(z)

But though a man is bound to maintain his wife and children, yet his funds are liable to creditors; and the decrees of the spiritual court for alimony, cannot affect the husband's estate as against creditors, but the person of the husband only.(a) However, whatever the wife saves from her alimony will be safe from her husband's creditors.(b)

4. If the husband beat or threaten to beat his wife outrageously, or otherwise use her ill, she may bind him to the peace, by application to the court of King's Bench, personally in term time,(c) or to a justice of peace,(c) or by suing a writ of *supplicavit*(d) out of Chancery;

(z) 2 Ridgw. P. C. 268. Hoare v. Hoare.

(a) 2 Atk. 511. Fitzer v. Fitzer.

(b) 1 Freem. 304. Lady Tyrrell's case. Sir Arthur George's case cited.

(c) Fost. 359. 1 H. P. C. 253. Ca. Temp. Hard. 74. 2 Str. 1202. 1 Burr. 621. 703. 11 Mod. 109.

(d) Dalt. c. 68. Lamb. 78. On a motion for a writ of "ne exeat regno," unless the husband would give security to abide by the event of a suit against him for cruelty and

or she may apply to the spiritual court for a divorce propter sævitiam.

The husband too may demand surety of the peace against his wife. (e)

The writ of supplicavit is a most effectual means of redress : the grievance complained of being drawn up in the form of articles, they are exhibited and sworn to in the court of Chancery by the complainant in person. The writ is then granted to her without putting her under the necessity of confronting her husband, which she must do before a justice of peace. The sheriff is required by the writ to take the husband and confine him till he enters into security for his good behaviour, in a large sum, for himself and two sureties.

The sum is proposed in court, by counsel, and assented to by the Chancellor before it is endorsed on the writ ; and the sheriff himself is ordered to take the security, and not the under sheriff.

In cases of unreasonable or improper confinement, the courts will relieve the wife on habeas corpus (f) And if upon the return of a habeas corpus sued out by the husband to bring up the wife, it appear

adultery ; the Chancellor said he would grant the writ if a precedent could be found. 1 Ves. jun. 94. Colger v. Colger.

(e) 2 Str. 1207.

(f) 1 Burr. 634. Lord Ferrer's case.

that he hath used her ill, and she exhibit articles of the peace against him, the court will not order her to be delivered to him.(g)

The husband cannot seize and force to live with him a wife separated by articles entered into in consideration of money received by the husband.(h)

(g) 4 Burr. 1991. Anne Gregory's case.

(h) 1 Burr. 542. 1 Str. 478.

CHAP. VI.

Of the Wife's right to Dower.

1. *Of what she shall be endowed.* 2. *In respect of what Seisin, and (3) Estate in her Husband, and (4) of what Duration of it.*
5. *Where she has Election—dos de dote.*
6. *Of barring Dower.* 7. *Of assigning Dower.* 8. *Of suing for an Assignment.*
9. *Some Incidents of Tenancy in Dower.*

THE wife(a) is, after the death(b) of the husband, entitled(1) for term of her life to

(a) So that she be nine years old at his death, (Co. Lit. 33. a. even though the husband be younger) and the marriage have actually been solemnized. Perk. 306. A second wife married during the life of the first, shall not be endowed; nor she who takes a second husband, living the first. Perk. 304, 5. Moor, 226.

(b) That is, his natural death; for dower does not attach on his civil death as by entering into religion, (Co. Lit. 33. b.) because the husband cannot be professed without the consent of the wife.

AMERICAN CASES.

(1) The widow of an alien, who cannot hold against the government, is not entitled to dower in his lands. Sewell v. Lee, 9 Mass. Rep. 393.

Vide 1 Johnson's cases 27. 2 Johnson's cases 29.

the third part of such lands and tenements as her husband was during the coverture seised of in fee, fee tail general, or as heir of the special tail; to have and hold the same in severalty by metes and bounds,(c) for her dower.

(c) Lit. s. 36. 'The exceptions seem reducible to the following: 1. Wife, alien; until naturalized, or married by license of the king. (Co. Lit. 33. a. 1 Roll. Abr. 675. Co. Lit. 31. a.) 2. Jewess, wife of Christian by birth or conversion. Ibid. 3. Wife that has eloped with an adulterer; unless her husband be reconciled. Id. 32. a. 4. Wife divorced causa præcontractus, consanguinitatis, frigiditatis. Ibid. 5. Wife of husband who has been *attainted* of high or petit treason. Id. 37. a. But not in præmunire, *misprison* of treason, or attainder of felony only. (1 Ed. 6. c. 12. Co. Lit. 31. a.) 6. Wife attainted of felony, if she remain unpardoned at the death of her husband. Co. Lit. 33. a. in notis.

Coke says that a divorce for adultery, where there is no elopement, is no bar of dower. Rolle states, that such a divorce is a bar; but his case is cited under the head of *Elopement*, (1 Roll. Abr. 689.) which does not seem to have been observed by Mr. Hargrave. (Co. Lit. 32. a. note 9.)

The husband's license for his wife to live in adultery, or his bargain and sale of her. (12 Mod. 232.) is void, and has not the effect of a reconciliation. (ibid. note 10.) 2 Inst. 435.

But it is said, that in dower assigned *ad ostium ecclesiæ* a proviso. "Notwithstanding any divorce, &c." is good. (Co. Lit. 32. a.) Adultery is no bar of dower at common law, and the statute of Westmr. 2. c. 34. only makes it so where the wife quits her husband. 2 Inst. 435.

Women are dowable of *tythes*, where, since, 32 H. 8. c. 7., they have become a lay fee ; (d) and the surest way is to endow them of the third sheaf, or the third part of the tithes generally, because it is uncertain what land will be sowed.

Of *mines*, wrought during the coverture, whether by the husband, or lessees for years ; whether paying pecuniary rents, or rents in kind ; and whether the mines are under the husband's own land, or have been absolutely granted to him, to take the whole stratum in the land of others ; and dower may be assigned of mines, either collectively with other land, or separately of themselves.(e)

Of *common*,(f) which is certain ; but not of common without number, because it cannot be divided without surcharging the common.(f)

Of *a manor*, the profits of courts, fines, and heriots ; but the endowment must be of the

(d) Co. Lit. 32. a.

(e) 1 Taunt. 402. Stoughton v. Leigh, id. 142. It shall be assigned by metes and bounds if practicable ; otherwise by a proportion of the profits, or separate alternate enjoyment of the whole for short proportionate periods. If land assigned in dower contain an open mine, tenant in dower may work it for her own benefit. Ibid.

(f) Co. Lit. 32. a.

AMERICAN CASES.

(1) Since the principle of survivorship among joint tenants has been abolished by statute, the wife of a joint tenant is entitled to her dower. Holbrook v. Finney, 4 Mass. Rep. 566.

third part of the *manor*, and not of certain messuages, acres, and rents.(g)

Of an *advowson*, (be it appendant or in gross, for it may be divided, viz.) to have the third presentation.(h)

Of a *mill*; to have the third toll dish, or "integrum molendinum per quemlibet tertium mensem."(i)

Of a *bauliwick*;(k) to have the third part of the profits.

Of a *fair or market*;(l) the third part of the stallage.

Of *offices*; as of the office of the marshal-sea, or of parker;(m) to have the third part of the profits, and be contributory to a third part of the charge.(n)

Of a *piscary*(o) or *dove-house*;(p) the third part of the profits; as *tertium piscem, vel tertium retis jactum*.

Of *shares* in the navigation of the river Avon; under 10th Anne.(q)

Of *rents* in fee; rent service, rent charge, and rent seek.(r)

(g) Godb. 135. Bragg's case. Co. Lit. 32. a.

(h) Co. Lit. 32. a.

(i) Ibid.

(k) Perk. 342.

(l) Co. Lit. 32. a.

(m) Co. Lit. 32. a.

(n) Style, Pr. Reg. 122.

(o) Co. Lit. 32. a.

(p) Ibid.

(q) 2 Ves. jun. 652. Buckeridge v. Ingram.

(r) Co. Lit. 32. a. The widow of tenant in tail of a

But not of *annuity* ;(s) and therefore, if the heir on whom a rent charge descends, brings a writ of annuity, and recovers judgment before the wife brings her writ of dower, then is it become an annuity in perpetuum,(t) and the wife shall be barred.

But the heir's merely having an election to bring annuity or to distrain, does not bar the wife.(u)

Of *copyhold lands* ; a woman shall not be endowed unless there be a special custom for it ;(x) nor

Of a *castle for the defence of the realm* ; though she may of a castle for habitation,(y) and of the capital messuage, being "*caput baroniæ or comitatus*,"(z) in which too, she may reside her quarantine, or forty days after the death of her husband ; the day he died being counted one ; during which time she is to be provided with all necessaries at the expense of the heir.(a)

rent is not entitled to her dower, *against the donor*, though the widow of tenant in tail of *land* is entitled to dower against the donor, notwithstanding the failure of issue.

(s) Perk. 341. Co. Lit. 32. a.

(t) Co. Lit. 144.

(u) Moor, 83.

(x) 4 Rep. 22. 5 Rep. 116. Hob. 216:

(y) Co. Lit. 31. b.

(z) 3 Lev. 401. *Lady Gerrard v. Lord Gerrard*. Salk. 54. pl. 1. 253. pl. 3. 5 Mod. 64. Comb. 352. Ld. Raym. 72.

(a) Co. Lit. 32. b. 34. b. 2 Inst. 16. . Where the husband dies intestate, the wife is entitled, under 22 and 23

2. The husband must be seised either in fact or in law, to entitle his wife to dower. But a seisin in law is sufficient ; because otherwise it would be in the husband's power to defeat his wife of subsistence after his death, by his own negligence or malice ; therefore, if the ancestor die seised, and a stranger abates, *(b)* and the husband die before he enter into the land, yet his wife shall be endowed. *(c)*

So, if the husband purchase rent, and die before the day of payment, yet his wife shall be endowed ; nay, though the day of payment be come and the rent tendered to the husband, who refuses to receive it, and dies before any thing paid in the name of seisin. *(d)*

If there be neither seisin in fact nor in law, in the husband during the coverture, but only a right of entry or action, there his wife shall not have dower ; as where a man is disseised or ousted by abatement or otherwise, and then marries and dies before entry. *(e)*

Car. 2. s. 10. to a third of his personal property, and if he leave no children, to a moiety, after all claims on his estate are satisfied.

(b) For after the death, and before the abatement, the husband was seised in law during the coverture.

(c) Perk. 371. So, where the husband claims by remainder after a lease for life, and the same circumstances occur. *id.* 372. But if father die seised, stranger abates, and marries *after* abatement, but dies before entry, his wife shall not be endowed. *id.* 367.

(d) Perk. 373.

(e) *Id.* 366.

So where a man marries after an exchange made, and before he has completed it on his part, by entry, (f) dies; or where a man makes a bargain and sale to one and his heirs by indenture enrolled, with a proviso, that if such an act be done, the bargain and sale shall be void; and after the bargainor marries,—the condition is broken,—and bargainor dies before entry, his wife shall not have dower. (g)

In some cases an instantaneous seisin, (1) (as where the same act which gives the husband the estate, conveys it out of him again; where he is the mere instrument of passing the estate) does not seem sufficient to entitle the wife to dower; but when the land *abides* in the husband for a single moment, that is,

(f) Id. 369.

(g) 6 Rep. 34. Fitzwilliam's case.

AMERICAN CASES.

(1) Where the husband is seized but for an instant, his wife shall not be herein endowed; and this seisin for an instant, is where the husband by the same act, by which he acquires the seisin parts with it. *Holbrook v. Finney*. 4 Mass Rep. 566.

Where the seisin of the husband is instantaneous, his widow is not entitled to dower. *Slow v. Tift*. 15 Johns. Rep. 458.

As where land is conveyed to the husband during coverture, who at the same time executes a mortgage of the same to the grantor, this is a case of instantaneous seisin. *Ibid.* *Ibid.*

when he has a seisin for an instant *beneficially for his own use*, the title to dower shall arise in favour of the wife. Thus, in the case put above, where lands descend on a stranger who is married, and a stranger enters immediately, by abatement, after the death of the ancestor, there the wife of the heir shall have her dower; and yet the husband had but a seisin in law, and that for an instant only; for the abatement divested it from him. So in the case of the father and son joint tenants who were hanged in one cart; where the question depended on the priority of their death.^(h) And where the husband *tortiously* gains an instantaneous seisin, as against the person benefitted by and deriving estate from such tortious act, the wife is entitled to dower, for he is estopped to that the husband was never seised.⁽ⁱ⁾

3. The husband must be seised of an estate in fee simple, fee tail general, or as heir of the special tail,^(k) which necessarily excludes descendible freehold: therefore if a man make a lease for life, reserving rent to him and his heirs, and after marry and die; his wife shall not be endowed of this rent, because it is but a descendible freehold: nor of the

(h) Cro. Eliz. 503. Broughton v. Randall.

(i) Sir W. Jon. 317. Matthew Taylor's case cited.

(k) Lit. sec. 36. The wife of donee in special tail shall be endowed if the husband die without issue. Id. sec. 53.

land, because the husband was not seised during the coverture.(1)

But if tenant in tail bargains and sells his land to the husband and his heirs, or grants all his estate to one and his heirs, though it be of things which lie merely in grant, as rent, common, advowson, &c. yet the wife of the grantee shall be endowed, till the grant be avoided by the issue in tail; for nothing appears to the contrary, but that it may be an absolute fee; and till the issue comes in to shew it otherwise, it shall be regarded as such.(2)

If tenant in tail be attainted of treason, and the king grant the land over to one and his heirs, the wife of the grantee shall be endowed; for the king had a qualified fee, so long as the tenant in tail had issue.(3)

Tenant in tail covenants to stand seised to the use of himself for life, and after, to the use of his eldest son in tail; and then marries and dies; yet his wife shall be endowed, because, when he limits an estate for his own life, he

(1) 1 Saund. 261. Plow. 556.

(2) Plow. 557.

AMERICAN CASES.

(1) An actual corporeal seisin, or right to such seisin during coverture, is indispensable to give dower—the seisin of a vested remainder is not sufficient. *Eldridge et al. v. Forestal et ux.* 7 Mass. Rep. 253.

Vide *Collins v. Torrey.* 7 Johns. Rep. 278. *Embree v. Ellis.* 2 Johns Rep. 119.

hath executed all the power he hath over the estate by the above mode of conveyance, and the remainder is merely void, so that he continues tenant in tail as before. (n)

Tenant in special tail, remainder to him in general tail or fee ;—his wife dies without issue ;—if he marry again and die, his second wife shall be endowed ; for his life estate of tenancy in tail, after possibility of issue extinct, was merged by the accession of remainder in tail or fee. But of an estate to a man and his wife, and the heirs of their bodies, a second wife shall not be endowed, because the issue by her cannot inherit per formam doni.(o)

3. A. The husband must have the freehold and inheritance in him, simul et semel, otherwise the wife shall not be endowed ; 1) therefore, if lands are given to the husband for life, remainder to B. in tail, remainder to the husband in fee or tail, and he dies, living B. or any of his issue, the wife shall not be endowed.(p)

A. tenant for life—remainder to B. and his heirs for the life of A.—remainder to the heirs male of the body of A.—remainder over—A. marries and dies without issue ; his wife shall

(n) Cro. El. 279. Blythman's case.

(o) Lit. sec. 53.

(p) 1 Roll. Abr. 677. Perk. 335.

AMERICAN CASES.

(1) Vide 7 Mass. Rep. 253. 15 Johns. Rep. 21, 2 Johns. Rep. 119.

not be endowed, (q) because the husband was not seised of the freehold and inheritance, simul et semel ; the remainder to B. being an intervening vested estate of freehold, and not a possibility.(r)

But where A. was tenant for life, remainder to trustees for 99 years, remainder to the heirs of the body of A. A.'s wife shall be endowed because the intermediate estate was only for years.(s)

Where lands were conveyed to the use of A. and C. his wife, for life, remainder to B. the son of A. and C. for life, remainder to the first and other sons of B. in tail. A. and his wife died in the lifetime of B., who afterwards died without issue, leaving a wife ; she was held entitled to dower, for the estate for life in B. was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.(t)

If a lease for years be made before the lessor marries, his wife shall be endowed of the third part of the reversion, and of the third part of the rent as incident to it ; but she shall not be endowed of the rent per se merely, because the husband had neither freehold nor inheritance in it ; and if no rent be reserved on the lease, than " cesset executio" during

(q) 3 Lev. 437. *Duncombe v. Duncombe.*

(r) *Fearne, Cont. Rem.* 509. 332. 6th Ed.

(s) *Ld. Raym.* 326. *Bate's case.*

(t) *Ca. Temp. Hardw.* 13. *Hooker v. Hooker.*

the term.(u) If a lease for life or years be made by the husband after marriage, his wife shall have her dower discharged of them, as she shall from other charges of her husband.(x)

3. B. A woman shall not be endowed of lands or tenements which her husband holdeth jointly(1) with another at his death ;(y) but the wife of the survivor shall be endowed, (z) if the property accrues to him in fee or fee tail : and of a tenancy in common, a woman shall be endowed ; but dower shall be assigned to her in common too, for she cannot have it otherwise than her husband had it.(a)

(u) An outstanding satisfied term, though created before marriage, will not bar dower in equity by a " cesset executio ;" for in equity such a term is equally bound with the inheritance. 2 P. Wms. 328. *Charlton v. Low*. But if such a term be once assigned to trustees for a purchaser, it will protect the estate in his hands against any claim of dower. 7 Ves. jun. 567. 10 Ves. jun. 246. But equity will not compel an assignment for the purpose of barring the wife. 7 Ves. jun. 567. *Maundrell v. Maundrell*.

(x) Co. Lit. 32. a. 1 Roll. Abr. 678.

(y) Lit. sect. 45.

(z) Cro. Eliz. 503. *Broughton v. Randal*.

(a) Co. Lit. 34. b. Lit. sec. 44.

AMERICAN CASES.

(1) But in Massachusetts widows of joint tenants have become entitled by statute to dower—the principle of survivorship being there abolished. Vide 4 Mass. Rep. 566.

Vide also *Dolf v. Basset*, 15 Johns. Rep. 21. Also 15 Johns. Rep. 319.

If the husband makes a feoffment in fee of land, and the feoffee builds thereon and greatly improves them in value, (1) yet the wife of the feoffor shall only have dower according to the value it was of in the husband's time ; (b) for if such feoffment were with warranty, the heir would be bound to render only the value, as it was at the time of the feoffment.

But if the heir improve the land by building or sowing it, the wife shall recover her dower with the improvement upon it, because by her husband's death, her title to dower was consummate, and the improvements as to her part were quasi on her land. (c)

4. The continuance of the husband's estate is in some cases material, in others not.

If the husband be seised of a defeasible estate during the coverture, yet his wife shall be endowed thereof till it be actually defeated ; as if the husband and wife, lessees for life,

(b) Co. Lit. 32. a.

(c) Ibid.

AMERICAN CASES.

(1) A widow, dowable in lands which were aliened by the husband or set off on execution against him during the coverture, is not entitled to the benefit of additions or improvements made by the purchaser, but only to a third part of the land in the condition it was at the time of the alienation. *Gore v. Brazer*, 3 Mass. Rep. 545. Vide also 9 Mass. Rep. 8. 9 Mass Rep. 218. 10 Mass Rep 80.

Same decision was made in New York in *Dolf v. Bassett*, 15 Johns. Rep. 21. Also in 11 Johns. Rep. 510 and 13 Johns. Rep. 179.

surrender to him in the reversion ; this is defeasible by the wife after the husband's death ; yet, in the mean time, if the reversioner dies, the reversioner's wife shall be endowed.(d)

Or if a feoffment be made to the use of J. S. till J. D. hath done such a thing, and then to the use of J. D. and his heirs ; if J. S. die, his wife shall be endowed till the thing be performed.(e)

So, if land be mortgaged to the husband in fee, and the condition be broken, and after, upon agreement, the mortgager have the land by payment of the money, yet at law (1) the wife of the mortgagee shall be endowed : (f) but in Chancery, when the mortgager comes to redeem, even the woman's dower is avoided, for her husband's estate was ab initio encumbered with equity, and in that court the

(d) 1 Roll. Abr. 677.

(e) Leon. 168.

(f) 1 Roll. Abr. 679.

AMERICAN CASES.

(1) Where a person seised in fee of land mortgages it, and afterwards marries, his widow on his death is entitled to dower out of the equity of redemption. *Coles v. Coles*. 15 Johns. Rep. 319.

Vide also *Collins v. Torrey*. 7 Johns. Rep. 278.

But in Massachusetts it has been decided that a widow is not dowable of an equity of redemption purchased by the husband during coverture, unless he have obtained a discharge of the mortgage. *Bird v. Gardner*. 10 Mass. Rep. 364.

mortgagee is considered a trustee for the mortgager.(g)

If A. seised in fee, covenant to stand seised to the use of himself and his heirs, till C. his second son take wife, and after to the use of C. and his heirs; and A. die, and the land descends to B. his heir, who dies, and then C. takes wife; it seems the wife of B. shall lose dower, because the estate of her husband was determined by express limitation, made before her title of dower attached.(h)

And if one grant a rent out of his land to J. S. and his heirs, upon condition that if the grantee die, his heir within age, the rent shall cease during such nonage; if the grantee die his heir being within age, yet the wife of grantee shall be endowed, but cessavit executio during the nonage of the heir, for such condition is part of the original constitution of the rent(i)

But if the husband, seized of a rent in fee or fee tail, release it to the terretenant, the rent is extinguished, and yet, as to the wife, has such continuance that she shall have dower thereof; which the husband's act cannot bar her of.(k)

So, if donee in tail of rent or land marries, and dies without issue, and the donor enters;

(g) Hardw. 465. Abr. Eq. 311.

(h) 1 Roll. Abr. 676. But the court was divided.

(i) Plow. 156. Perk. 327.

(k) 6 Rep. 79. 7 Rep. 65.

yet the wife of donee shall be endowed ; for dower is such an incident to an estate tail, that if one make a gift in tail upon condition that the wife of donee shall not be endowed, this condition is repugnant and void.(*l*)

However, if a rent be reserved to the *donor* and his heirs upon a gift in tail, the wife of the donor shall be endowed of the rent no longer than the estate tail continues.(*m*)

If tenant in tail discontinue in fee, and after marry, and disseise the discontinuee, and die seised, his wife shall not have dower, because the issue is remitted to the ancient entail, which, being a restitution of ancient right, takes place place of the dower of the wife of a subsequent wrongful estate, inasmuch as the estate of which she is dowable is defeated.(*a*)

So if a man hath title of action to recover land, and he enters and disseises the tenant, and dies seised upon which his heir enters and is remitted to the right which his ancestor formerly had ; the wife of the ancestor shall lose her dower of the wrongful estate which her husband had, and which is now determined and gone, by act of law.(*o*)

The father exchanges lands with a stranger, and dies ; the son marries and enters into the land taken in exchange ; the stranger being impleaded for his lands, vouches his son as

(*l*) Bulstr. 163. 8 Rep. 34. Co. Lit. 31.

(*m*) Dy. 343. pl. 58. Co. Lit. 32. a.

(*n*) F. N. B. 149. Co. Lit. 331. a.

(*o*) F. N. B. 149.

heir, who enters into the warranty and loses, whereupon execution goes against him; the son dies; his wife shall not be endowed of the lands taken in exchange; because the recovery thereof against her husband hath relation to the time of exchange made, which was before her title of dower began (*p*)

But if dsseisor makes a feoffment with warranty, and the land is recovered from the feoffee, who vouches the feoffor and recovers in value against him, feoffee's wife shall be endowed of the land recovered in value, and not of the land lost, because by title paramount. (*q*)

5. When the husband seised of land in fee, exchanges the same with a stranger, for other lands, and dies, the wife has election to be endowed, either of the lands given or taken in exchange, because her husband was seised of both during the coverture; (1) but she shall not have dower of both, for that would be unreasonable. (*r*) If she be lawfully evicted from her dower by elder title, she shall be endowed anew. (*s*)

(*p*) Perk. 309.

(*q*) Perk. 322. F. N. B. 150.

(*r*) Co. Lit. 31. b. Perk. 318.

(*s*) Perk. 419. 1 Roll. Abr. 684. 4 Rep. 122.

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(1) The widow of A. is entitled to dower in certain lands [which he conveyed to B. in exchange for other lands which B. conveyed to A. by deed in common form, for valuable consideration. † New-Hampshire 6 Rep. 5.

5. A. A woman cannot be endowed from land already assigned in dower.^(t) As if there be grandfather, father and son, and the father, or after his death the son, endow the grandmother; the mother shall not be endowed of the grandmother's third after her decease, because the grandmother's dower defeats, as to so much, the descent to the father, and by consequence the father was seised of no more than two-thirds of that land, and therefore the wife of the father was entitled only to a third of these two-thirds. But if the grandfather had enfeoffed the father of the whole land, and died, and the grandmother had been endowed either by recovery or assignment, there the mother should be endowed of the grandmother's third after her decease, because by the feoffment the father was seised of the whole estate; and though the grandmother recovered one-third out of that estate during her life, yet the mother shall be endowed of that third when it falls into possession, since the father was actually seised of it during the coverture by virtue of such livery.

If there be grandfather, father, and son, and the two first die, and the mother be endowed by the son of a third part of the whole, either by assignment, in pais, or upon a recovery in a writ of dower, and the grandmother bring a writ of dower against the mother,

(t) Perk. 315. 516. 4 Rep. 122. Bustard's case. F. N. B. 149. 1 Roll. Abr. 677. Co. Lit. 32. 42. a.

and recover, she leaves the reversion in her ; for the dower was vested in the mother by the assignment or recovery, and is only defeated during the life of the grandmother, whose estate, as to the mother, is less than her own estate: therefore the mother, after the grandmother's death, may enter into that third recovered from her,(u) and by consequence the heir may re-enter into the second dower assigned to the mother upon the recovery against her by the grandmother ; for she cannot have both.

Lands subject to a title of dower were devised to a person in fee, who died leaving a widow ; this widow sued for her dower, and recovered a third part of the whole, without any regard to the title of dower in the widow of the testator, who did not put her claim in suit. It was holden by the court, that the testator's widow not having recovered her dower, the dower of the devisee's widow was not to be considered as *dos de dote*.(x)

From the preceding cases it appears, that in every difficulty respecting dower, an answer to the question " was the husband seised during the coverture, simul et semel in the free-

(u) Except where dower is assigned "*ex assensu patris*," or "*ad ostium ecclesiæ*," the widow cannot enter immediately on her husband's death, but is put to her writ of dower where the heir neglects to assign, because the demand is uncertain. Co. Lit. 37. a.

(x) 2 Vern. 403. Hilchins v. Hilchins.

hold and inheritance of the property," will lead to a safe conclusion.(1)

6. The only method(y) of barring dower effectually at the present day,(2) where a join-

(y) See the note at the beginning of the chapter, as to who shall not be endowed, and what criminal act of the husband or wife will prevent dower from attaching.

By the custom of London, a married woman may bar herself of dower by a deed of bargain and sale acknowledged before the lord mayor, or the recorder and one alderman. The wife must be examined apart from her husband, and the deed proclaimed and enrolled in the hustings of pleas of land. Bohun priv. Lond. Emerson, 26. 1 Cruise on Real Prop. 179.

AMERICAN CASES.

(1) Several of the principles of the preceding section will be found very learnedly discussed in *Fosdick v. Gooding et al.* 1 Maine Rep. 30.

(2) A wife may bar herself of dower in her husband's lands by executing a deed with her husband, the usual mode of her doing this is her introducing into the deed a clause of relinquishment of dower in the premises sold. *Fowler v. Shearer*, 7 Mass. Rep. 14. Vide also 9 Mass. Rep. 161. 9 Mass. Rep. 218.

[This custom prevails also in New Hampshire & Maine.]

Or this relinquishment may be effected by her separate deed and such a deed is not voidable by her. Vide the cases last cited.

But her executing the deed with her husband will not bar her dower unless it contain a clause expressing that intention. *Catlin v. Ware*, 9 Mass. Rep. 218.

But where no estate passed by such deed to the grantee, he having recovered judgment and satisfaction against the

ture has not been made, is, for the husband and wife to join in levying a fine, or suffering a recovery;(z) and this shall bar her of her dower totally in the lands affected by the fine or recovery, because in both cases she is examined upon record by the judges, as to her consent; and having nothing in the lands in

(z) Plow. 515. Eare v. Snow, 10 Rep. 49. 43. The præcipe in the recovery answers the writ of covenant in the fine to bring her into court. An outstanding satisfied term, though created before marriage, will not in equity be a bar to dower by a "cesset executio" during the term. 2 P. Wms. 328. Charlton v. Low. But if such a term be once assigned to trustees for a purchaser, it will protect the estate against dower in his hands. Though equity will not compel such assignment for the purpose of barring the wife. 7 Ves. jun. 567. Maundrell v. Maundrell, If a man immediately before marriage makes a long lease to prevent dower, it seems equity will assist her. Gilb. lex Prætor. 267. 2 Bro. C. C. 345. 1 Ves. jun. 22. and the cases there cited—that such a lease will prevent dower, at law, see Show, P. C. 71. Hargr. Co. Lit. 208. a. note 1. 2 P. Wms. 709.

AMERICAN CASES.

grantor for breach of his covenant of seisin, the wife is not barred of her dower by joining in such deed. Stinson v. Sumner, 9 Mass. Rep. 143.

But she is not entitled to dower in lands of which she has signed a mortgage deed with her husband, (relinquishing her dower therein) and which were afterwards redeemed by a stranger; for the purchaser of the right of equity becomes seised of the whole fee simple. Popkin v. Bumstead, 8 Mass. Rep. 491.

her own right, her joining in such acts can be to no other purpose but to bar her dower.

But if the husband be seised in fee, and a stranger levy a fine to him and his wife "sur conusance de droit come ceo, &c." of these lands, and the husband and wife grant and render the same to the stranger and his heirs, the wife shall not be barred of her dower, because she is not examined in this case as in the other.(a)

However, if the husband levy a fine with proclamations, of his lands, and die, his wife is bound to make her claim within five years of his death, otherwise she shall be debarred of her dower.(b)

If a woman takes a lease for life of her husband's lands after his death, she shall have no dower, because she cannot demand it against herself; and if she takes a lease for yaers only yet she shall not sue to have dower during these years.(c)

It is a good plea in bar of dower, that the demandant detains from the heir such charters, (shewing them in certainty, unless they are in a bag sealed, or box locked, and then it is sufficient to say such bag or box of charters) and that if she will deliver them to him, he is and always hath been ready to render her dower. If the detainer be denied, and

(a) Brook, 77.

(b) 2 Rep. 93. Bingham's case. 10 Rep. 49. 99. 3 Inst. 216.

(c) Perk. 350. Moor, pl. 103. F. N. B. 149.

found against her, she shall be barred forever. But the bar is only for such lands as the charters concern; and none but the heir can plead it,^(d) which he must do before imparlance.^(e)

If lands, money, goods, &c. are devised to a woman without saying, in lieu or satisfaction of dower, yet the wife shall have both; but if it be said, in lieu or satisfaction of dower, she cannot have both,⁽¹⁾ but may waive which she pleases.^(f) However, devises have fre-

(d) 9 Rep. 17, 18. Plow. 85. 1 Roll. Abr. 679.

(e) Salk. 252. pl. 2. Burdon v. Burdon; and he cannot plead it where he is in degree of a stranger; as where he has the land by purchase; where himself delivered the charters to the wife; if he be not immediately vouched; if he come in as vouchee, or as tenant by receipt. Perk. s. 359. 1 Cruise on Real Prop. 179.

(f) 2 Chan. Ca. 24. 2 Vern. 365. Abr. Eq. 218-9. 2 Freem. 234. 1 Br. P. C. 591. Pr. Ch. 133. 2 Atk. 427. 3 Atk. 8. Id. 436. 1 Ves. 230. 9 Mod. 152. 2 Br. P. C. 12. 1 Br. Ch. Rep. 292. A bequest of the residue of personal estate will not alone be construed as intended in satisfaction of dower. 1 Ves. 230. Ayres v. Willis.

AMERICAN CASES.

(1) If a widow waive the provision made for her in her husband's will, she may have her dower assigned in his real estate; but she can receive no part of his personal estate, if he has disposed of it by will. 1 Maine Rep. 148.

Where an annuity is given in lieu of dower, an acceptance of the legacy by the widow is an equitable bar of dower, and a payment of part to the widow and a judgment recovered by her for the part remaining due, will

quently been deemed a satisfaction of dower, even where the will has been silent, on account of strong and special circumstances; as where allowing the wife to take a double provision, would be inconsistent with the dispositions of the will;(g) in such a case the widow must make her election. But she shall not be put to this election, unless there be a plain declaration, or clear incontrovertible result from the will, that the testator meant she should not take both.(h) Nor shall she in any case be obliged to make her election till the account be taken, and it appear out of what estates she is dowable.(i)

Where a man left lands to his wife during her widowhood, and she married again, and brought dower, the devise was held no bar. Nothing being said in the will to put her to an election, and a collateral recompense being no bar.(k)

But dower may be prevented from attaching to any property purchased by the husband

(g) Ambl. 466. *Arnold v. Kempstead*, 1 Br. Ch. Rep. 292. Ambl. 682. 730. 3 Br. Ch. Rep. 255. 1 Br. Ch. Rep. 445.

(h) 3 Br. Ch. Rep. 347. *Foster v. Cook*, 2 Ves. jun. 572.

(i) 1 Br. Ch. Rep. 445. *Boynton v. Boynton*.

(k) Moor, pl. 103. Co. Lit. 36. b. Bac. Abr. Dower, F.

AMERICAN CASES.

be a good plea in bar to an action for dower, it being evidence of an agreement to elect the annuity in lieu of dower. *Van Orden v. Van Orden*. 10 Johns. Rep. 30.

during coverture, and that without vesting the estate immediately in trustees; as thus,

The land may be limited to the purchaser's appointees, &c. (in the fullest manner) and in default of appointment, to the use of him and his assigns during his life; and from and after the determination^(l) of that estate by any means in his lifetime, to the use of some person and his heirs during the natural life of the purchaser, in trust for him and his assigns; and from and after the determination of the estate so limited in use to the said trustee and his heirs, to the use of the purchaser his heirs and assigns, for ever.

The disqualifications enumerated at the commencement of this chapter, operate of course as a bar to dower.

In what manner jointure becomes a bar to dower will appear in the next chapter.

7. Upon the death of the husband, the right to dower which the wife acquired by her marriage, becomes consummate. But unless the precise portion of land which she is to have, is particularly specified as in dower, "*ad ostium ecclesiæ*," and ex "*assensu patris*," she cannot enter⁽¹⁾ until

(l) This remainder to the trustees, being a *vested* estate, the husband is never seised during the coverture, *simul et semel* of the freehold and inheritance. See sect. 3. A. of this chapter.

AMERICAN CASES.

(1) A widow having right of dower, cannot lawfully enter after her husband's death, or in any manner inter-

her dower is assigned to her.(*m*) The widow, therefore, has no estate in the land until assignment,(*n*) for the law casts the freehold on the heir, immediately upon the death of the ancestor; but she is allowed to remain in the mansion house of her husband for forty days after his death, and this called her quarantine.

The heir, where there is no dispute, usually assigns the widow's dower; but in case a disseisor, abator, or intruder assign, it is good, and cannot be avoided, unless they are in of such estates by fraud and covin of the widow.(*o*)

Where the heir or other tenant of the land refuses to assign dower, and the widow is compelled to resort to the courts of law to obtain her dower, the assignment is made by the sheriff.(*p*)

Where the property is capable of being severed, dower must be assigned by metes and bounds; and, where the assignment is

(*m*) Lit. s. 43.

(*n*) Gilb. Ten. 26.

(*o*) Co. Lit. 35. a. 357. b.

(*p*) Co. Lit. 34. b.

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fere with the estate, untill an assignment is made by the heir or other tenant of freehold, or in a course of legal proceedings; for she is not seised of an undivided third part on the death of the husband but has an inchoate right merely. *Windham v. Portland.* 4 Mass. Rep. 384. *Sheafe v. O'Neal.* 9 Mass. Rep. 13.

by the sheriff, if he does not return seisin by metes and bounds, it is ill.(1) When no division can be made of an inheritance, the endowment must be made in a certain and special manner ; as of a mill, of which the endowment shall be of the third toll dish, or of the entire mill for a certain time.

The right to have an assignment by metes and bounds, may be waived by the widow, and in that case an assignment in common will be good.(q) And where the husband was seised in common, his widow cannot be endowed by metes and bounds.(r)

The assignment of dower(2) must be of part of the land whereof the widow is dowable ; for an assignment of lands whereof she is not dowable, or of a rent issuing out of such lands, is no bar of dower at law : (s) but a rent issuing out of the land whereof a wo-

(q) 9 Vin. Abr. 256. *Coots v. Lambert*.

(r) Lit. s. 44. Co. Lit. 32. b. That the widow of a tenant in common may be endowed, see 3 Lev. 84. *Sutton v. Rolfe*.

(s) 4 Rep. 1. b.

AMERICAN CASES.

(1) Vide the case of *Watkins*. 9 Johns. Rep. 245. *Gardiner v. Spikeman*. 10 Johns. Rep. 368. *Dolf v. Basset*. 15 Johns. Rep. 21. 1 Maine Rep. 30.

(2) Vide *Parker v. Murphy*. 12 Mass. Rep. 485. *Sheafe v. O'Neal*. 9 Mass. Rep. 9.

As to the practice in New York. Vide 15 Johns Rep. 533. 10 Johns. Rep. 368. 9 Johns. Rep. 245. 6 Johns Rep. 281.

man is dowable, may be assigned in lieu of dower ;(*t*) and if a tenant in tail assigns a rent out of the land entailed, to a woman entitled to dower out of such estate tail, not exceeding the yearly value of her dower, it will bind the issue in tail.(*u*)

The assignment of dower must be absolute, and not subject to be defeated by any condition, nor lessened by any exception or reservation ;(*x*) and where lands assigned to a widow for her dower are evicted, she shall be endowed of a third of the remaining lands.(*y*)

By the assignment, the widow acquires an estate of freehold without livery of seisin ; she is *in* of the estate of her husband,(*z*) and considered as holding by an infeudation immediately from his death,(*z*) and a warranty in law is included, that the tenant in dower being impleaded, shall vouch and recover in value a third of the two remaining parts whereof she is dowable.(*a*)

(*t*) 1 Roll. Abr. 683.

(*u*) And. 287. Brickley v. Brickley.

(*x*) Co. Lit. 34. b. Cro. Eliz. 450.

(*y*) 4 Rep. 122. a.

(*z*) Gilb. Uses, 356. 395.

(*a*) Co. Lit. 38. b.

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(2) When the assignment is made, she acquires no new freehold, but is *in* by her husband, her seisin being deemed in law to be a continuance of her husband's seisin. 4 Mass. Rep. 384. 9 Mass. Rep. 13.

8. Where the wife is refused her dower by the heir or terretenant, she has for the recovery of it, the writ of "dower unde nihil habet," which lies where no dower has been assigned ;(b) but if any part of the dower has been assigned she must have recourse to the writ of right of dower ;(c) a more general remedy,(1) extending either to a part, or the whole, and of the same nature and efficacy with respect to a claim of dower, as a writ of right respecting a claim to an estate in fee simple ; and in actions of this kind the parol does not demur on account of the infancy of the heir ;(d) nor can the judgment in these actions be set aside on such account.(e)

Where the sheriff make an improper or

(b) Gilb. Uses, 374.

(c) Id. 367.

(d) 1 Roll. Abr. 137.

(e) Cro. Eliz. 309.

AMERICAN CASES.

(1) In an action of dower, it is not necessary to describe the land by metes and bounds. *Ayer v. Spring*. 10 Mass. Rep. 80.

If the action of dower be brought against one as tenant in possession, the demandant must shew that he is in possession, and not that he has the right. *Merrill v. Russel*. 1 Mass. Rep. 469.

Tenants in severalty, cannot be joined in a writ of dower. 1 Maine Rep. 30.

As to practice in New York of declaring and pleading in actions of dower. Vide the cases cited in the note to page 333.

malicious assignment of dower,(1) it will be set aside and the sheriff punished : as where the sheriff in assigning dower of a house chalked out a third part of each chamber,(f) instead of assigning certain chambers therein. In another case the sheriff was committed for refusing to make an equal allotment of dower, and for taking sixty pounds to execute his writ of execution, and an information ordered against him.(g) And where only a third part of the lands was assigned, without taking notice of a coal work which was on the estate, the court ordered that the doweress should, if she pleased, have a new assignment.(h)

Where the heir within age, or his guardian, endow the widow of more than she is entitled to, the heir when of full age, may have a writ of admeasurement of dower against the wid-

(f) Palm. 264, 5.

(g) 1 Keb. 743. Longvill's case.

(e) 1 Vern. 218. Hoby v. Hoby.

AMERICAN CASES

(1) The widow's dower is to be assigned out of each distinct parcel, where the husband has aliened to two in severalty and also where the husband's grantee has conveyed in separate parcels to several. Fosdick v. Gooding. 1 Maine Rep. 30.

Commissioners are appointed in Massachusetts to assign dower ; who are to set off to the widow, such portion of the whole estate as will yield her one third of its whole income. 4 Mass. Rep. 533. 12 Mass. Rep. 456.

ow.(i) This writ is viscontiel, returnable before the sheriff, and therefore the parties may plead before him if they think proper; but the plaintiff may without shewing any cause, remove the writ into the common pleas, and thereupon process goes out. The sheriff cannot, however, make admeasurement, but must extend all the lands, and return them to the court of Common Pleas, and upon that return admeasurement will be made.(k) But no writ of admeasurement lies, because the widow after assignment improves the land, so as to make them of greater value than the other two parts; and it is the same, if improvement arises from the working of mines, which were open at the time of the assignment.(l)

It was provided by the statute of Merton, 20 Hen. 3, c. 1. that the widow should recover damages from the death of her husband, provided he die seised:(1) but this is only in writs of dower unde nihil habet, and does not extend to the writ of right of dower, because

(i) Gilb. Uses, 379. 381.

(k) Ibid.

(l) Id. 390.

AMERICAN CASES.

(1) The demandant in dower is not entitled to damages unless the husband die seised. *Embree v. Ellis*, 2 Johns. Rep. 119.

As to the privilege of quarantine allowed the widow in New York and the time in which she must bring her action. *Vide* 7 Johns. Rep. 247.

damages can only be given for the detention of the possession ; and in writs of right, where the right itself is disputed, no damages are given, because no wrong is done till the right is determined. Damages are only due from the time when the claim of dower has been made, for the heir on whom the law casts the freehold is not bound to assign dower until it is demanded.(1) But a demand in pais, before good evidence, is sufficient.(m) And it has been held,(n) that dower is demandable of the heir though he is under age, and not of the guardian ; that the heir, if he entered on the land to assign dower, would not be a trespasser on the guardian, and that the neglect of the heir in not assigning dower upon demand, though he did not actually refuse it, was such a refusal in law as to entitle the widow to damages. In several cases, dama-

(m) Co. Lit. 32. b.

(n) Bull. N. P. 117. *Corsellis v. Corsellis*.

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(1) But a delay of the widow in bringing her action, will not prejudice her claim for damages. *Hitchcock v. Harrington*, 6 Johns. Rep. 290.

In the above case the claim for the widow for damages was supported after the lapse of 25 years. It would seem therefore, that the statute of limitations, in regard to real actions does not in New York apply to actions of dower. *Ibid*.

Where the demandant in dower recovers damages, she is also entitled to courts of suit. *Hillyer v. Larzelere*, 10 Johns. Rep. 216.

ges have been given from the death of the husband.(o) And they are allowed in writs of error brought on a judgment in dower by 16 and 17 Car. 2. c. 8. s. 3., under which the plaintiff in error becomes bound to pay such costs and damages as shall be awarded. But if the heir or terretenant assigns dower, and the widow accepts thereof, she cannot afterwards claim damages;(p) and damages of this kind are not considered as debt, until they are ascertained; so that if the widow die before the damages are ascertained, her representatives will not be entitled to them.

It is now settled, that widows, labouring under so many disadvantages at law from the embarrassments of trust terms, &c. are entitled to every assistance which a court of equity can give them, not only in paving the way for them to establish their right at law, but also in giving them complete relief, when the right is ascertained;(q) and in the exercise of this jurisdiction, courts of equity will enforce discovery against a purchaser for even valuable consideration, without notice.(r) And though the widow should die before she had established her right, equity will, in favour of her personal representatives, decree an account of the rents and profits of the land of

(o) Co. Lit. 33. a. *Belfield v. Rowze*, Cas. Temp. Hard. 19. *Dobson v. Dobson*.

(p) Co. Lit. 33. a.

(q) 2 Ves. jun. 122. *Mundy v. Mundy*.

(r) Dick. 795. *Wild v. Wells*.

which she afterwards appeared dowable ; but will not allow interest.^(s)

Where a mother was guardian of her infant child and received the rents and profits of the estate of which she was dowable, but dower was never assigned, the Lord Chancellor held that the want of a formal assignment of dower was nothing in equity : and if the heir brought a bill against the mother for an account of profits, a court of equity would allow a third of the profits for the right of dower.^(t)

9. There are some advantages attending tenants in dower, which do not extend to jointresses. Tenant in dower, by the old common law, is subject to no tolls or taxes ; and her's is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt if contracted during the coverture. On the other hand a widow may enter at once on her jointure land, as she might have done on dower "*ad ostium ecclesiæ*," where a very tedious proceeding is necessary to compel a legal assignment of dower ; and though dower be forfeited by the treason of the husband, or the elopement and adultery of the wife, yet lands settled in jointure remain unimpeached to the widow in those cases.

After waste committed by her, an action lies at common law against tenant in dower. And

^(s) 1 Cruise, 171.

^(t) 1 P. Wms. 118. *Duke of Hamilton v. Mohun*.

by stat. 11 Hen. 7. c. 20., "if any woman having an estate in dower, or for life, or in tail, jointly with her husband or to herself only, or to her use, in any manors, lands, tenements, or other hereditaments, of the inheritance or purchase of her husband, or given to the husband and wife in tail, or for life, by any of the ancestors of the husband, or by any other person seised to the use of the husband or of his ancestors, and being sole, or with any aftertaken husband, discontinue, alien, release, or confirm with warranty, or by covin suffer any recovery against them," all such acts shall be void, and the remainderman is entitled to enter on the death of the party, or the commission of the act. It is decided in the case of *Kirkman against Thomson* (Cro. Jac. 474)(*u*) that this act extends only to discontinuances by widows (or by them and their aftertaken husbands) of the lands of their husbands, to the prejudice of the heirs of such husband, to whom the same were limited.

The statute extends to trusts, (*x*) and also to equities of redemption. This subject will be considered more at length in Chapter VII.

(*u*) Over-ruling the case in Co. Lit. 365. b.

(*x*) 2 Vern. 489. 1 Eq. Ca. Abr. 220.

CHAP. VII.

1. Of Jointure; and in what Manner it is a Bar of Dower. 2. By what Act the Wife may defeat such Provision; and of the Incumbrances to which it is subject. 3. The Countenance afforded it in Equity.

1. A JOINTURE is a competent livelihood of freehold for the wife, of lands, &c. to take effect presently in possession or profit after the death of the husband, for the life of the wife at least; if she herself be not the cause of the determination or forfeiture thereof. *(a)*

Before the 27th H. 8. a woman could not be barred of her dower, by any assignment or assurance to her of other lands whereof she was not dowable; (except in the case of dower “ad ostium ecclesiæ,” or “ex assensu patris;”) whether such assignment or assurance were made by the husband before or after marriage, or by the heir after the husband’s death, or however expressly they were stated to be in bar of dower :

But by the stat. 27 H. 8. c. 10. jointure, if the five following requisites be duly observed, is made a bar of dower. *(b)* 1. That it be made

(a) Co. Lit. 36. b.

(b) Where A. agreed by marriage articles to pay his wife if she survived, £1500. in full of dower, thirds, cus-

before coverture. 2. That it be made to the woman herself, and not to others in trust for her. 3. That it be in satisfaction of her whole dower. 4. That the estate take effect immediately from the death of the husband. 5. That it be for term of the wife's life, or greater estate.

First, then, if a jointure be made to a woman during coverture in satisfaction of dower, she may waive it after her husband's death, but if she enter and agree thereto, she is concluded ;(c) for though a woman is not bound by any act when she is not at her own disposal, yet if she agree after she is at liberty, it is her own act, and she cannot avoid it.

And if she agree, the settlement will be maintained to its full extent ;—as where the husband after marriage settled lands to the use of himself and wife, in tail, for her jointure, and during the coverture part of the lands were evicted,—the husband died, and the wife entered into the residue,—upon a reference out of the court of wards to the two chief justices, it was resolved that she should have a recompence for the part evict-

tom of London, or otherwise ; this bars the wife of her share by the statute of distributions.

(c) Co. Lit. 36. 4 Rep. 3. What shall constitute an agreement, see 3 Rep. 26. a. 3 Leon. 272. And. 352. The accepting of an annuity for three years, under a will, the widow claiming during that time both the legacy and dower, is not conclusive upon her. 3 Ch. Rep. 255. Wake v. Wake.

ed.(d) If the wife have an old right before the coverture, and afterwards takes a jointure of the same lands, she shall be remitted.(e)

2. It is so necessary, says Lord Coke, that a jointure should be made to a woman herself, and not to others in trust for her, that though the wife should assent to a jointure made in trust for her, yet it would not be good : (f) for the statute only bars dower when the possession is executed in the woman.

But as the intention of the statute was to secure the woman a competent provision, and also to exclude her from claiming dower and settlement both, it seems that a provision or settlement on the wife, though by way of trust, if in other respects it answers the intention of the statute, will be enforced in a court of equity.(g)

3. The jointure must be in satisfaction of her whole dower : for if it be in satisfaction of part only, it is uncertain for what part of the dower it is to be in satisfaction, and therefore void in the whole.(h) Therefore if an estate be made to the wife in satisfaction of part of her dower, before marriage, and after marriage other lands are conveyed, and said to be

(d) Moor, 717. pl. 1002.

(e) Cro. Jac. 490.

(f) Co. Lit. 36. b.

(g) 1 Atk. 562. Jordan v. Savage, Bac. Abr. Jointure, B. 5.

(h) Co. Lit. 36. b.

in full satisfaction of dower, if the wife waives the lands conveyed to her after marriage, she shall have dower of all the lands of her husband, notwithstanding the settlement in satisfaction of part. (i)

Lord Coke says, that the jointure must be expressed to be in satisfaction of dower, but this does not seem to be within the words or intention of the statute ; and in a case where it was not so expressed in the deed, the opinion of the court was that it might be averred, and that such averment was not traversable. (k)

But a devise of an estate to a wife cannot be averred to be in satisfaction of dower or jointure, unless it be so expressed in the will ; (l) for there can be no averment contrary to the consideration implied in every devise, which is the kindness of the testator. Even where such intention is expressed, the wife, as we have seen, may waive the devise or legacy, and insist on her dower. But she has only an election, and if she claim dower, is estopped to ask for the devise or legacy ; if she accepts the provision in the will, she takes it with the condition expressly annexed, and

(i) 4 Rep. 5.

(k) Owen, 33.

(l) But this expression will be implied, and the widow put to her election, where it is utterly inconsistent with the other dispositions of the will, that the wife should have both devise and dower. See preceding chapter, sec. 6.

is barred for ever of her dower,^(m) unless evicted from the estate devised⁽ⁿ⁾ in lieu of it.

4. The estate limited in jointure, must by the first limitation take effect in possession immediately from the death of the husband : therefore if an estate be made to A., for life or years, remainder to the wife for life, this is not good, though A. dies, or the years are expired in the lifetime of the husband.^(o)

A feoffment in fee to the use of feoffee for life, remainder to the use of his second son for life, remainder to the use of such wife as the son shall take, remainder to the heirs of the son. The father dies ; the son marries and dies : the wife is not by this settlement barred of her dower ; for this at the time of the creation was no certain provision for the wife's life, for the son might have married and died in the lifetime of the father.^(p)

^(m) Dy. 220. 4 Rep. 4.

⁽ⁿ⁾ Ante, chap. 6. sec. 6.

^(o) 4 Rep. 2. Hut. 51. Hob. 151. Quære, Whether equity will not in such case confine the wife to her election. Bac. Abr. Jointure, B. 6.

'The widow may enter on her jointure lands without process, immediately on the death of her husband : which she cannot do on dower, except dower " ad ostium ecclesiæ," or ex assensu patris.' And lands settled in jointure are not forfeited by the treason of the husband. But a jointress shall not have emblements, which a dowress has, because dower is a continuance of the husband's estate. 9 Vin. 373. pl. 82. Fisher v. Forbes.

^(p) 1 Sid. 3, 4. per Bridgman.

And if a man makes a feoffment to the use of himself for life, remainder to his son and his wife, and the heirs of the body of the son, this is no good jointure, though the wife hath an immediate freehold : for to be within the cases of the statute, whereby dower is barred, the wife must have a sole property after the death of her husband.(q)

But if an estate be made to the husband for life, remainder to J. S. for the life of the husband, to support contingent remainders, remainder to the wife for life ; this is a good jointure though not within the express words of the statute, for it is within the equity and design of it.(r)

A jointure limited to take effect immediately on the death of the husband, shall take effect as well on a civil as a natural death ; therefore if the husband enter into religion, is banished, or abjures the realm, the wife shall have her jointure.(s)

5. The estate limited in jointure must be for term of the wife's life, or greater estate. Therefore if an estate be made to the wife, for the life or lives of many others, this is no good jointure ; for if she survives such lives, (as she may, then it would be no competent provision during her life.(t) So, if a term

(q) Winch. 33.

(s) Co. Lit. 133. Moor, 851. 3 Bulstr. 188. 1 Roll.

(r) 4 Rep. 3.

Rep. 400. 2 Vern. 104.

(t) Co. Lit. 36. b. Copyhold lands are no good jointure within the statute. Gilb. Ten. 182.

for 100 years be limited to the wife, if she so long live, or absolutely, this is no good jointure to bar dower :^(u) for an estate for years, of whatever duration, is less than a freehold.

But if a sufficient estate be limited to the wife upon condition, her acceptance of such conditional jointure, makes it good ; for this estate supports the wife well enough, and it is in her power to continue it during her life ; therefore an estate limited to the wife “ *durante viduitate*,” is a good jointure ; for it cannot determine but by her act. ^(x)

If the wife be evicted of her jointure, it is no bar of dower ; which in such case she may claim even of lands purchased by the husband during coverture, and aliened again before his death.^(y) The limitation of jointure will

^(u) Ibid. Though a collateral satisfaction is not pleadable at law in bar of dower, yet acceptance by an adult of a term of years, or copyhold, or of a sum of money, or of any other kind of collateral satisfaction in lieu of dower, is a good bar in equity. Hargr. Co. Lit. 36. b. note (1) 224. 2 Vern. 365. Lawrence v. Lawrence. And though at law, if the jointure be not conformable to statute, the widow may claim both the property intended as jointure, and dower also, yet equity obliges her to elect between them. Infants will not be bound by a precarious provision : and as to them, an equitable provision, to be effectual, should be as certain as is required to operate as a legal bar. 4 Br. C. C. 500. Caruthers v. Caruthers.

^(x) 4 Rep. 3.

^(y) Hargr. Co. Lit. 33. a. note (8) Maunsfield's case, 28. Eliz. The alienees of such lands will therefore do

remit the wife to a former right in the same lands.(z) But in cases where the widow's election to be remitted would not prejudice another person, she will not be remitted against her inclination.(a)

2. A woman may defeat her own jointure, whether made before or after marriage, by joining her husband in a fine(b) or recovery ;(c) and she is so far bound thereby, that if the jointure were made before marriage, she is also barred to claim dower in any other lands of the husband's ; but if the jointure was made during coverture, she may claim dower in the other lands.

well to require a fine of them from husband and wife, or to ascertain that the title to the jointure is sound.

(z) Cro. Jac. 490. Co. Lit. 348. a. 2 Roll. Abr. 422. (m) pl. 1.

(a) Co. Lit. 357. Dy. 351. b.

(b) Co. Lit. 36. Dy. 358.

(c) 10 Rep. 43.. 2 Roll. Abr. 395. Because the "præcipe" in the recovery answers the writ of covenant in the fine, to bring her into court, where the examination of the judge destroys the presumption that she acts by coercion of her husband ; and therefore she cannot defeat her jointure by a bargain and sale, or any conveyance in pais. Jointure is not forfeited by elopement and adultery, as dower is. 2 Bl. Comm. 12 Ed. 139. note 15.

Nor by the treason or felony of her husband. Co. Lit. 37. a. And the court of Chancery will decree against the husband a performance of marriage articles, though he alleges and proves that his wife lives separate in adultery, 3 Cox's P. W. 277. 2 Bl. Comm. 139.

So, if a feme covert joins her husband in levying a fine to raise a sum of money by way of mortgage, this shall bind her ;(d) yet in this case she does not absolutely depart with her estate for life, but there results a trust to her to redeem, and to reinstate herself in her jointure, and the money shall be paid out of the personal estate of the husband.(e) Thus too, if a jointure be made out of lands which are in mortgage, the wife may redeem, and her executor shall hold over till repaid with interest.(f)

The jointress takes her estate subject to prior incumbrances,(g) as if tenant in tail of a trust makes a mortgage, or acknowledges a judgment or statute, and then levies a fine, and settles a jointure, the jointress shall hold it subject to the mortgage or judgment, in the same manner as if the mortgager or conusor

(d) 2 Chan. Ca. 162.

(e) 1 Vern. 41. 213. 2 Vern. 436. But if *at the time* when such mortgage or security is made, (whether before or after marriage) a settlement is also made, the husband is not considered as answerable to the wife's estate for money borrowed. Per Lord Hardw. in *Lewis v. Nangle*. Ambl. 150.

(f) 1 Chan. Ca. 271. 2 Vent. 343.

(g) And where provision is made for a wife in lieu of her jointure, by articles during coverture; if the wife after her husband's death enter but upon part of the lands, she shall perform the whole articles. 2 Vern. 224. If a rent charge is settled on her, and part of the land charged afterwards devised, the rent charge shall not be apportioned. 1 Vern. 347. *Knight v. Calthorpe*.

had been tenant in tail of the legal estate, and after the mortgage or judgment, had levied a fine and made a jointure ; because the subsequent declaration of the use of the fine is merely the act of the tenant in tail, and he cannot by any act of his own make a subsequent conveyance take place of a precedent : besides the feme claims under that fee which the tenant in tail gained by the fine, and that fee was subject to all the charges(*h*) he had laid upon it.(*i*)

And where the issue and jointress claim by the same settlement, if there be a prior incumbrance, the jointress shall contribute, and not lay the whole burthen on the heir.(*k*) But if by accident, after the execution of a power, there is an excess in the lands settled on the jointress, she sh^oll have the benefit ; and by parity of reasoning, if there be a deficiency by casualty, she must acquiesce under it.(*l*)

(*h*) That is, actual, but not merely possible charges : as where A. being indebted 700*l*. made a settlement of 100*l*. per ann. on himself for life ; to his wife for her jointure ; remainder to their issue in tail. A decree that the lands should be sold for the payment of the 700*l*. and the surplus settled on the wife or issue, was reversed. 1 Vern. 203. *Carpenter v. Bennett*.

(*i*) 1 Chan. Ca. 119, 120.

(*k*) 1 Vern. 440. *Carpenter v. Carpenter*.

(*l*) 2 Atk. 544. *Marchioness of Blandford v. Duchess of Marlborough*. A settled an equity of redemption, and came bankrupt ; the wife is bound by the account settled by the assignees with the mortgagee, unless she

8. If a man articles before marriage(*m*) to settle a jointure on his intended wife, after the marriage is consummated the husband dies before any settlement is made, an execution of the articles will be decreed in equity :(*n*) and a jointress in equity is considered a purchaser for valuable consideration, who may set aside a prior voluntary conveyance as fraudulent against her.(*o*) But where by a marriage agreement, the son's intended wife was to have more than would have been left to the father, (though the son was indebted to him) his wife and two daughters being

can shew particular errors. 1 Vern. 179. Knight v. Bampffield.

(*m*) But where tenant in tail with power to make a jointure, articulated to make one, and died without doing it, the widow's bill for a settlement was dismissed, the power remaining unexecuted. 1 Vern. 406. Elliott v. Hale.

(*n*) 2 Vent. 343. If a man covenants to settle lands of such value, as a jointure, and the covenant is omitted in the settlement, yet it subsists in equity: the value of the lands to be estimated, as at the time of the covenant. 1 Vern. 217.

(*o*) 1 Ch. Cas. 100. So the concurrence of the wife in destroying an existing settlement on her, for the benefit of the husband, is a sufficient consideration for a new settlement, even more valuable than the former. (2 Lev. 70. Scott v. Bell, 148. 1 Eq. Ca. Abr. 354.) So, her concurrence in destroying dower. (2 Lev. 146. Lavender v. Blackstone.) But if an unreasonable settlement be made in consideration of her releasing dower, it seems that in favour of subsequent purchasers, equity will restrain her to dower. 1 Vern. 294. Dobin v. Coltman.

left unpreferred, the court of Chancery would not decree, but left the party to her remedy by law.(p)

A jointress cannot defeat her jointure by any act in pais: thus, a voluntary bond to make a jointure was given after marriage, and jointure made accordingly: the wife delivered up the bond, and the jointure was evicted. The court held that it should be made good out of the husband's personal estate,(q) especially as there were no creditors; for the delivery of the bond by a feme covert could in no way bind her.

And the court will make up, out of the husband's property in the hands of his representatives, any deficiency in the covenanted amount of jointure:(r) as where a jointress brings

(p) 2 Ch. Cas. 17. 1 Cha. Ca. 100. *Douglas v. Ward*. 400*l.* per annum *clear of all taxes*, being settled under a power to settle 400*l.* a year; this was held an execution of the power, and the covenant to make the 400*l.* clear, a mistake. *Ambl.* 424. *Lady Londonderry v. Wynne*. And a jointure made by *will*, under a power to make one by *deed*, was held good in equity, the wife having no other provision. 2 P. Wms. 489. *Tollett v. Tollett*.

(q) 1 Vern. 427. *Beard and Nuthal*, and no laches can be imputed to her for omitting to take any steps during the coverture. 1 Abr. Eq. 222. *Fothergill and Fothergill*.

(r) 1 Vern. 217. *Speake v. Speake*, 440. 2 P. Wms. 222. 2 Vern 379. *Lady Clifford v. Lord Burlington*. And where the wife had brought a considerable portion, and the lands on which her jointure was charged proved deficient in title and value, the wife, even though she had

her bill to have an account of the real and personal estate of her husband, and to have satisfaction thereout for a defect of value of her jointure lands, which he had covenanted to be and continue of such value:

Though it be admitted that a court of equity cannot regularly assess damages, yet in this case a master in Chancery may properly enquire into the amount of the defect in such lands, and report it to the court, which may decree such defect to be made good, or send it to be tried at law upon a quantum damnificat.(s)

So, if there be a covenant that a jointure shall be of such yearly value, and it fall short, the jointress may commit waste, so far as to make up the defect; and equity will not prohibit, though her estate be not without impeachment of waste.(t) But on a motion to stay a jointress tenant in tail after possibility of issue extinct; the court held that she being a jointress within 11 H. c. 7. c. 20., ought to be restrained, and therefore granted an injunction against wilful waste.(u)

And if a bill is brought by an heir at law, or any other person, against a jointress, whereby the party would avoid the jointure under pretence that his ancestor was only tenant

levied a fine of them, was decreed satisfaction for the deficiency. 1 Br. P. C. 464. *Lady Hooke v. Grove.*

(s) 1 Abr. Eq. 18. An action on the case brought at law for not making a jointure. 2 Roll. Rep. 488.

(t) 1 Abr. Eq. 221, 2. *Carew and Carew.*

(u) Ibid. *Cook v. Winford.*

for life, &c. ; and he seeks for a discovery of deeds and writings, whereby he would avoid the title of the jointress, he shall never have such a discovery, unless by his bill he submits to confirm her title.(x)

So, if a jointress prays a discovery of deeds and writings against an heir at law, if the heir submits by answer to confirm the jointress's title, she shall have no such discovery.

A settlement or jointure on a marriage, though made very unequally, and in favour of the wife, will not be set aside in equity, as that cannot put the wife in statu quo ;(y) and in many cases her jointure is no bar to further provision, either from her husband's intention or otherwise. As where by articles made on marriage of an infant in consideration of 3500l. then paid to the husband, a suitable jointure was to be made on her, and she was to convey her lands to be limited to the husband in fee ; the jointure was settled, and the wife a party to the deed ; but she never conveyed her estate, nor was she required to do so by her husband. The husband died, and the wife entered upon the settled lands. Held she was not bound by the articles, nor by her acceptance of jointure ; she therefore kept her own estate, and the jointure also.(z)

(x) 2 Vern. 701. S. P. though the jointure was made after marriage, 1 Vern. 479.

(y) 2 P. Wms. 619. North v. Ansell.

(z) 3 Br. P. C. 514. Lucy v. Moore, ; see too Lannoy v. Lannoy, Sel. Ca. in Ch. 48.

And where A. covenanted that in consideration of 1,200l. he and all claiming under him, should convey to B., or pay back the money: a conveyance was made, and then B. was evicted by a jointress, who claimed under a settlement made by her husband as former owner of the estate: B. made the jointress his executrix, and died. Held that A. should pay back the money, and that the executrix of B. should have that, and her jointure also.(a)

But if a testator by will before marriage gives 2,000l. per annum to any woman he may marry, and afterwards by codicil gives his wife the same jointure, she cannot take both.(b)

Consideration of the Statute 11 Hen. 7. 20., continued from Chap. VI.

The statute of 11 Hen. 7. c. 20.(c) does not extend to lands which originally belonged to the wife, or which were derived from her ancestors; nor even to lands originally belonging to the husband, if such lands were given to the wife in tail general;(d) the object of the statute being only to prevent women from discontinuing the lands of their husband's to the prejudice of the heirs of such husbands to whom the same were limited.

(a) 1 Vern. 224. Jason v. Jervis.

(b) Osborn v. Duke of Leeds, 5 Ves. 382.

(c) See ante, page 292.

(d) 1 Conny. 369. Hughs v. Clubb. Or fee simple, Dy. 248. Dennis's case,

Therefore, if a man be seised of lands in right of his wife, and levy a fine, taking back from the conusee an estate in special tail, remainder to the heirs of the wife, and they have issue, and then the husband dies, and the wife marrying again, she and her second husband levy a fine; this is directly within the letter of the statute; and yet not within its meaning, because it was originally the wife's estate.(e) And it is said to have been adjudged upon the same principle, that if the husband be seised of lands in right of his wife, and both join in levying a fine, and the conusee grants them a rent in tail, and the husband dies having issue, and then the widow aliens rent, the disposition is not within the provision of the statute.(f)

So, if lands be given in fee simple to husband and wife before marriage, and afterwards the husband and wife levy a fine of the whole to the father, who grants it to them again in tail; the husband's moiety only is within the statute, for the first gift of the father in fee simple was not within the act, so that the donees took moieties in their own right; therefore, when the husband and wife joined in the fine, their several shares passed to the father, the one from the wife, the other from her husband, so that upon the regrant, the wife's moiety could not be considered as proceeding from the hus-

(e) Co. Litt. 366. a.

(f) Cro. Eliz. 2. Foster v. Pitfall.

band's ancestor within the intent and meaning of the statute.(g)

Where a husband seised in fee devised lands to his wife in tail general, remainder over to a stranger, and the wife having married again after her husband's death, and having suffered a recovery, the daughter of the first husband entered for the forfeiture, it was determined, that although the case was within the letter of the statute, yet it was not within the intention of it, as the remainder was limited from the heirs of the husband to a stranger.(h) But where the husband or his father, being seised of lands in fee, enfeoffs B. upon condition to regrant the same to the husband and wife in tail, which is accordingly done, this is an entail within the meaning of the statute; that is, a gift to the wife by the provision of the husband or his ancestor; though it does not seem to be within the letter of the act, as the tenants in tail claim under B. the feoffee.(i)

The act does not prevent an alienation by the wife with the husband who made the assurance.(j) Nor where the next heirs consent to the alienation, provided such consent appears on record.(k)

(g) Moor, 715. Cro. Eliz. 525. Laughter v. Humphrey.

(h) Cro. Eliz. 2. 2 Leon. 261.

(i) Moor, 93. 3 Rep. 50. Bron's case.

(j) Cro. Jac. 474. 1 Ves. 337.

(k) 3 Rep. 58. b. An acceptance by the heir of a fine from the wife would perhaps be a sufficient consent on record.

Although the wife or her relations may advance *money* to the husband or his friends in consideration of the lands settled on her in jointure, that circumstance will not except the case out of the act, but the whole transaction will be considered as relating merely to the marriage, and the lands settled upon the wife, a provision by the husband or his friends for the wife within the letter and meaning of the statute.

Accordingly where A. being seised in fee, of lands, covenanted with B., in consideration of 200*l.* paid by B., and of a marriage between C. the son of A., and D. the daughter of B., to convey the lands to the use of C. and D., and the heirs of the body of D., and to his right heirs; the marriage took effect, the lands were settled, and there was issue of the marriage, when C. made a feoffment of the lands, and levied a fine with the wife to the feoffee: one of the questions was, whether this settlement on the wife being made in consideration of money paid by the wife's father, as well as of the marriage, was within the statute? and it was resolved in the affirmative.⁽¹⁾

By the same reasoning, if the estate belong to the wife's father or relations, payment of money by the husband or his friends, in consideration of the marriage, will not make him or them purchasers within the meaning of the

(1) Cro. Jac. 474, Cirkman v. Thompson, Dy 146.

statute ;(*m*) for the estate moving from the wife's father or relations, is not within the words or intentions of the act, which was chiefly made for the benefit of the husband's heirs, who before the passing of it were frequently disinherited by the discontinuance of the widow ; and, with respect to the money paid by the husband or his friends, it is not considered in the nature of a purchase of the specific estate, but advanced in consequence, and as a part of the marriage contract.

If however the transaction be between a stranger, the wife's friends, and the husband, and the stranger, in consideration of a sum of money paid by the husband and the friends of the wife, convey lands to the wife in jointure, this would be considered a purchase of the husband, within the letter and meaning of the statute.(*n*) And it is said, that if husband and wife join in selling her estate, and purchase other lands with the money, which lands are settled on both, this is a jointure within the act ; because the money was a chattel vested in the husband, which he might have disposed of as he pleased ; so that when he invested it in the purchase of other lands, and settled them upon himself and wife, the law will consider such purchase and settlement as a jointure on the wife, within the meaning of the statute.(*o*)

(*m*) Cro. Jac. 624. Kynaston v. Lloyd, Cro. Car. 244.

(*n*) Moor, 250.

(*o*) Palm. 217.

It seems that the lands, in order to be of the purchase of the husband within the act, must be for a valuable consideration, a consideration merely good and meritorious, not being sufficient ; accordingly, where A., in consideration of the good service done by B., his domestic male servant, and in contemplation of a marriage between B. and C. the cousin of A., enfeoffed B. and C. of lands in tail ; upon a question whether this was a jointure on the wife “ *ex provisione viri* ” within the statute, the determination was in the negative, because the consideration of service was not such a valuable consideration as the act required. *(p)* But where husband and wife were joint copyholders in fee, and the former purchased of the lord of the manor the freehold and inheritance of the lands, which were limited to the husband and wife in tail, the husband died leaving issue, and the wife entered and suffered a recovery ; this was held a forfeiture within the statute, for the copyhold tenure was extinguished by the purchase and acceptance of the new estate. *(q)*

Feme tenant in tail *ex provisione viri* accepts a fine sur cognizance de droit come ceo, &c. and thereby grants and renders the land

(p) Cro. Jac. 173. Ward v. Walthew, Noy. 122., and the act does not extend to a gift by a stranger.

(q) Cro. Eliz. 24. Copyholds are not within the statute.

for 1000 years ; this is an alienation within the statute, though no discontinuance ; for if a different construction were made, the act would be of little effect.^(r) But a lease for twenty-one years granted by a woman tenant in tail ex provisione viri is no forfeiture, and can only be avoided by the issue in tail ; although such a lease as is not warranted by 24 H. 8. c. 28.

Therefore if such issue levy a fine during the widow's life, the lease will be binding upon the issue in tail and his conusee, and also those in reversion, during the continuance of the estate tail ; and though the issue in tail had been entitled to the reversion in fee expectant upon the estate tail, which reversion would have passed to his conusee, yet while there was issue in existence who could inherit under the entail, the lease could not be impeached. But if there should be a failure of persons capable of inheriting under the entail during the term, the conusee of the issue might avoid so much of it as remained unexpired for then the reversion is let in, which he claims paramount the lease and the interest of the lessor.^(s)

If the widow demise such lands for the life of the lessor, or for three lives, in a manner not warranted by the statute of Hen. 8. these would be alienations within the statute of H.

(r) 4 Rep. 31. b.

(s) 4 Rep. 301. 322.

7. and the issue might enter immediately: such leases by tenant for life, or in tail, being discontinuances without the addition of warranty.(*t*)

Although the words of the statute appear to extend only to recoveries suffered by the wife alone, or jointly with a second husband; yet, if they come in as vouchees, it is within the intention of the act, and therefore a forfeiture.(*u*)

The statute according to its letter, avoids to all intents and purposes covinous recoveries, warranties, &c. ; yet the conclusion of law has been different in analogy to similar cases upon other statutes ;(*x*) so that discontinuances, &c. by widows alone, or by them and their aftertaken husbands, are not void immediately, but must be made so by the entry of the persons to whom the interest, title, or inheritance, would belong, if the feme discontinuors were then dead.(*y*) With respect to all other persons, and particularly the parties to the discontinuances, &c., such discontinuances, &c. are good and binding. If therefore the issue in tail levy a fine having right to the entail only, neither he, his issue, nor connusee, can enter upon the lands discontinued ; the two former because they are bound by

(*t*) 3 Rep. 50. b.

(*u*) Moor, 715.

(*x*) 3 Rep. 60. b.

(*y*) 3 Rep. 59. b.

the fine ; the latter, because the fine operating merely by estoppel, he has no title to the lands, and could not enter if the woman were dead.(z) But if the issue be seised of the reversion or remainder in fee at the time of the fine levied, although the issue are concluded by such fine, yet the conusee may enter in respect of reversion or remainder which passed to him by the fine ; as he is the only person who would be entitled to the estate on the death of the discontinuor : and note the different period allowed to entries under this statute to defeat the discontinuances of widows made of their husband's lands, when the issue in tail has disabled himself by fine, and to entries made under the statute de bonis to avoid the leases of tenants in tail when his issue has barred himself by fine.

Feme tenant in tail of the provision of her husband, suffers a recovery, and then the issue in tail releases to the recoveror ; the issue of the releasor may enter under the statute ; for immediately upon the recovery suffered, a right of entry became vested in the issue, and by a mere deed of release, the first issue in tail cannot bar his descendants of such a right.(a)

Sir Edward Coke says, he conceives, that if a man make a feoffment in fee to the use

(z) Cro. Jac. 175.

(a) Doct. and Stud. lib. 1. c. 31. 3 Rep. 71. a.

of himself and wife in tail, remainder to the use of the husband in fee, and has issue a daughter, and dies leaving his wife enseint of a son, whereby the reversion in fee descends to the daughter; if the wife and daughter join in levying a fine, or suffering a recovery before the birth of the son, or if the widow alone levy a fine or suffer a recovery, and the daughter neglects to enter, or by some other means disables herself from taking the benefit of the act, yet the son may enter under the provisions of the statute; because the daughter does not claim the lands by purchase in nature of a perquisite, but per formam doni quasi by descent; and by the express words of the statute, the persons to whom the lands belong after the decease of the woman, shall enter into the tenements, and enjoy and possess them according to such title and interest as they shall have if such woman had been dead, and no discontinuance, warranty, or recovery made.(b)

It remains only to observe, that the principle which induces courts of equity to direct marriage settlements to be framed in such manner as will best answer the intention of the parties and the purposes of the marriage contract (notwithstanding the articles entered into prior to the marriage, if pursued literally, would not have that effect) does not apply to limitations of the husband's lands in

(b) 3 Rep. 61. b.

jointure to the wife in tail, by articles in contemplation of a subsequent settlement: thus if articles are made before marriage with a view to a future settlement, limiting real estate to the parents for their lives, and during the life of the survivor, remainder to the heirs of their or either of their bodies, the limitation to such heirs will be considered words of purchase, and a settlement directed accordingly, viz. after the life estates to the parents, to their first and other sons in tail: for if an estate tail were given by the settlement to the husband and wife, or to either of them, as directed by the articles, the father alone during the marriage, or the settling parent alone, after the death of the other, might bar the issue and defeat a principal part of the settlement—the intended provision for the children of the marriage.—But it has been determined, that if neither the father alone, nor the surviving parent alone, can defeat the settlement when made pursuant to the articles giving the intail, equity will not interfere and direct a strict settlement, merely because both parents may be entitled to bar their issue by fine or recovery; for such power might be left in both for prudent purposes, and is not inconsistent with the probable intention of the settlement: so that if land ex provisione viri were agreed by marriage articles to be settled on the husband and wife for their lives, remainder to the heirs of the body of the wife by him, the court will not in-

terpose and make a different settlement ; because the husband alone cannot by any act destroy the entail in the wife during the coverture ; and she cannot do so alone after his death, being restrained by the statute of Hen. 7.(c)

(c) 1 P. Williams, 123. 2 Ves. 358.







